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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 249.

NEWMAN ERB, AS RECEIVER OF THE KANSAS CITY, WYANDOTTE AND NORTHWESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

*vs.*

OTTO J. MORASCH AND ELIZA MORASCH, AS NEXT OF KIN OF IRENE MORASCH, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED APRIL 5, 1899.

(17,349.)

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1 In the Supreme Court of the State of Kansas.

Be it remembered that on the 6th day of October, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a bond for costs, which, with the endorsements thereon, is in the words and figures as follows, to wit:

2 In the Supreme Court of Kansas.

NEWMAN ERB, as Receiver, ET AL., Plaintiff- in Error,
*vs.*
OTTO J. MORASCH ET AL., Defendants in Error. } Security for Costs.

We and each of us enter as security for all costs which may accrue to said defendants in error or to the officers of this court herein; and in default of payment by said plaintiff- in error of said costs and after ten days' notice, we agree that execution may issue against our property for unpaid costs.

NEWMAN ERB,
*As Receiver of the Kansas City, Wyandotte & Northwestern Railroad Co.,*
By its att'ys, WAGGENER, HORTON & ORR.
J. R. MULVANE.

10, 5, '98.

(Endorsed:) No. 11288. Newman Erb, rec., etc., *vs.* Otto J. Morasch. Bond for costs. Approved. Filed Oct. 6, 1898. Jno. Martin, clerk supreme court. This bond is perfectly good. ——, Attorney for plaintiff- in error.

3 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error and a precipe for summons in error, together with copies of certain papers, files, records, and proceedings of the court of appeals, northern department, eastern division, State of Kansas, certified to by the clerk of said court of appeals and attached to said petition in error, and which are in words and figures as follows, to wit:

4 11288; 268.

In the Supreme Court of the State of Kansas.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*v.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error.
No. —.

Filed Oct. 6, 1898. Jno. Martin, clerk supreme court.

*Petition in Error.*

Now comes Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, plaintiff in error, and complains of the said Otto J. Morasch and Eliza Morasch, as next of kin of Irene Morasch, deceased, defendants in error, for that the said defendants in error upon September 17th, A. D. 1898, at a special term of the Kansas court of appeals, northern department, eastern division, sitting at Topeka, Kansas, recovered a judgment by the consideration of said court against this plaintiff in error, affirming in that court the judgment of the district court of Wyandotte county, State of Kansas, rendered for $1,020, with interest and costs, in favor of defendant in error and against this plaintiff in error, at the December term of said court for 1893, in a case pending in said district court wherein Otto J. Morasch and Eliza Morasch, as next of kin of Irene Morasch, deceased, were the plaintiffs and Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, was the defendant, which said case was taken by the plaintiff in error upon proceedings in error from the district court of Wyandotte county, State of Kansas, to the said Kansas court of appeals.

And plaintiff in error further says that a certified copy of said record, judgment, and of the opinion and syllabus handed down at the time said judgment was rendered in said Kansas court of appeals is hereto attached, marked Exhibit "A," and made a part of this petition in error.

5 And plaintiff in error further says that in the judgment rendered in said Kansas court of appeals and in the opinion and decision handed down in that court there was a case decided and disposed of involving the constitution of this State and the construction thereof, to wit, section 17, article 2, which provides "that all laws of a general nature shall have uniform operation," and that said case also involved a provision of the Constitution of the United States and the construction thereof in this, to wit, that portion of the fourteenth amendment to the Constitution of the United States which provides that "no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And this plaintiff in error further says that there was error in

said record and judgment against this plaintiff in error and the proceedings in said Kansas court of appeals in this, to wit:

1. That the said Kansas court of appeals erroneously ruled and decided in said case that ordinance No. 522 of Kansas City, Kansas, of the date of September 26, 1888, regulating the running of locomotives and cars in that city, is not obnoxious or contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

2. That said Kansas court of appeals erroneously ruled and decided in said case that ordinance No. 522 of Kansas City, Kansas, of the date of September 26, 1888, regulating the running of locomotives and cars in that city, is not obnoxious or contrary to the constitutional provisions of the State of Kansas in not having uniform operation because of the exemption made thereby in section 8, excepting from the provisions of said ordinance No. 522 the Interstate Rapid Transit Railway Company running engines and cars by steam, a more dangerous railroad than that operated by plaintiff in error, excepting with reference to funerals and other processions.

3. That the said Kansas court of appeals erred in not ruling and deciding that said ordinance No. 522 of Kansas City, Kansas, was invalid and void because of being class legislation and in violation of that portion of the fourteenth amendment to the Constitution of the United States which ordains that "no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

4. That the said Kansas court of appeals erred in not ruling and deciding that said ordinance No. 522 of Kansas City, Kansas, was invalid and void because of being class legislation and in violation of section 17, article 2, of the constitution of the State of Kansas, which ordains "that all laws of a general nature shall have uniform operation," because said ordinance expressly exempted from its provisions one railroad company, except with reference to funerals and other processions.

5. That the said Kansas court of appeals erred in ruling and deciding that a trespasser upon the track and private grounds of a railroad operated by a receiver is entitled to the same rights and protection as a person at a public crossing of such railroad.

6. That the said Kansas court of appeals erred in ruling and deciding that the parents of a little child which, without the notice or knowledge of the engineer, fireman, or other trainmen operating an engine and train of cars, accidentally came out from the weeds and upon the said track in front of the approaching engine and train, and in which case the engineer, fireman, and trainmen did everything in their power they could do to stop the train and prevent any accident or injury as soon as the little child was seen or known to be upon the track, are entitled to recover large pecuniary
6 damages against the receiver of said railroad company, because the little child was accidentally run over and killed after it had accidentally got in front of said engine and train.

7. The said Kansas court of appeals erred in ruling and deciding

that in an action under section 422 of the Code it is not required that the petition shall state how the plaintiffs were injured pecuniarily to state a cause of action, nor is it necessary that it allege special damages to entitle the plaintiff to a verdict.

8. That the said Kansas court of appeals erred in ruling and deciding that "ordinance No. 522 of Kansas City, Kansas, making it unlawful for any railway engine or train or railroad cars to run within the city limits at a speed exceeding six miles an hour, is not void because section 8 exempted from its provisions the Interstate Rapid Transit Railway Company, it appearing that the excepted company is a street-car line, and not in fact a railroad within the same situation and conditions as ordinary railways to which the provisions of the ordinance were intended to apply."

9. That the said Kansas court of appeals erred in ruling and deciding that "the application of the requirements of the ordinance to the defendant's trains under existing conditions was not an unreasonable restraint upon the defendant or upon commerce, because the place where the killing occurred was within the suburbs of the city and not upon a highway or street crossing."

10. That the said Kansas court of appeals erred in ruling and deciding that "the failure of the defendant to observe the provisions of the ordinance by running its train within the city at a speed of fifteen miles an hour was negligence of which the deceased could have legally complained had she survived the injury, although at the time she was upon the defendant's unfenced track, not at any street crossing, and without license of the company thereto."

11. That the said Kansas court of appeals erred in ruling and deciding that the district court of Wyandotte county, Kansas, did not commit error in receiving incompetent evidence in this case over the objection and subject to the exception of plaintiff in error.

12. That the said Kansas court of appeals erred in ruling and deciding that the district court of Wyandotte county, Kansas, did not commit error in refusing to give the instructions asked for by plaintiff in error.

13. That the said Kansas court of appeals erred in ruling and deciding that the district court of Wyandotte county, Kansas, did not commit material error in giving certain instructions referred to in the record over the objection and subject to the exception of plaintiff in error.

14. That the said Kansas court of appeals erred in ruling and deciding that the district court of Wyandotte county, Kansas, did not commit error in overruling the motion of plaintiff in error for judgment upon the special findings of the jury.

15. That the said Kansas court of appeals erred in ruling and deciding that the district court of Wyandotte county, Kansas, did not commit error in overruling plaintiff in error's motion for a new trial.

16. That the said Kansas court of appeals erred in ruling and deciding that upon the record and testimony the defendants in error were entitled to recover judgment against said plaintiff in error rendered by the district court of Wyandotte county, Kansas.

17. That the said Kansas court of appeals erred in affirming in said case the judgment of the district court of Wyandotte
7 county, Kansas, in favor of the defendants in error and against plaintiff in error.

18. That the said Kansas court of appeals erred in ruling and deciding that the verdict and judgment of the district court of Wyandotte county, Kansas, were sustained by sufficient evidence.

19. That the said Kansas court of appeals erred in ruling and deciding that the verdict and judgment rendered in the district court of Wyandotte county, Kansas, were not contrary to law.

20. That the said Kansas court of appeals erred in ruling and deciding that the verdict and findings of fact of the district court of Wyandotte county, Kansas, were sustained by sufficient evidence.

21. That the said Kansas court of appeals erred in ruling and deciding that there was no error of law occurring at the trial of this case in the district court of Wyandotte county, Kansas.

Wherefore plaintiff in error prays that said rulings, decision, and judgment of the said Kansas court of appeals, so rendered as aforesaid stated, be duly reversed, vacated, set aside, and held for naught, and that the said court be directed to render judgment in favor of plaintiff in error and against defendants in error, and also that said plaintiff in error be restored to all things he has lost by reason thereof.

WAGGENER, HORTON & ORR,
*Attorneys for Plaintiff in Error.*

*Præcipe.*

The clerk of the said court will please issue summons in error in the above-entitled cause to McGrew, Watson & Watson, attorneys of record of said defendants in error, directed to the sheriff of Wyandotte county, Kansas, to be served and returnable according to law.

WAGGENER, HORTON & ORR,
*Attorneys for Plaintiff in Error.*

8 "A."

NEWMAN ERB, as Receiver, etc., Plaintiff in Error,
*v.*
OTTO J. MORASCH ET AL., Defendants in Error. } No. 268.

Kansas Court of Appeals, Northern Department, Eastern Division.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*vs.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendant in Error. } No. 9730; No. 268.

Be it remembered that on the 21st day of May, 1895, this cause was duly commenced in this court by the filing of an order of certi-

fication herein from the supreme court of the State of Kansas, a copy of which said order is in words and figures as follows, to wit:

Be it remembered that on Tuesday, the 21st day of May, 1895, before the supreme court of the State of Kansas, in session at its court-room, in the city of Topeka, the following proceeding, among others, was had and remains of record on page 337 of Journal X of said court, and is in words and figures as follows, to wit:

NEWMAN ERB, Receiver, etc., Plaintiff in Error,
*vs.*
OTTO J. MORASCH ET AL., Defendant- in Error. } No. 9730.

It is hereby ordered under and in pursuance of the provisions of an act of the legislature approved February 26, 1895, "An act concerning appellate courts, defining their jurisdiction, and the proceedings therein," and an act approved March 1, 1895, entitled "An act to amend section 4 of an act entitled 'An act concerning appellate courts, defining their jurisdiction, and the proceedings
9 therein,'" that case No. 9730, Newman Erb, receiver, etc., plaintiff in error, *vs.* Otto J. Morasch *et al.*, defendants in error, now pending in this court, is hereby certified down to the northern department of the court of appeals for the eastern division thereof, it appearing from an examination of the record in said case that the amount or value involved therein does not exceed $2,000, exclusive of interest and costs, and therefore that said case is within the jurisdiction of said northern department for the eastern division thereof.

The clerk of this court, in pursuance of this order, is hereby directed to transmit at once the record of said case and all papers therewith connected now on file in this court to the clerk of said court of appeals, together with the amount of all costs which have accrued in this court, which said court of appeals shall collect and return to the clerk of this court.

It is further ordered that the said court of appeals, after the record of this case is filed with its clerk, shall, upon twenty days' notice in writing to the parties in said case or their attorneys of record, proceed to hear and determine said case the same as if originally brought in said court.

Witness my hand and the seal of the court affixed at my office, in Topeka, this 21st day of May, 1895.

[SEAL.] C. J. BROWN,
*Clerk Supreme Court.*

Now therefore, in pursuance of the above order of the supreme court, I herewith transmit to the clerk of the eastern division of the northern department of the court of appeals, at Topeka, Kansas, the original record and all papers on file in said cause; and I hereby certify that the amount of the accrued costs of the supreme court in this case is $3.15.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Topeka, this 21st day of May, 1895.

[SEAL.] C. J. BROWN,
*Clerk of the Supreme Court.*

$5.00 on deposit.
No copy of record.

And therewith there was filed a petition in error, case-made, entry of appearance, and waiver of summons in error and bond for costs, all of which are copied in order as follows, to wit:

Copy.

NEWMAN ERB, Plaintiff in Error,
*vs.*
OTTO J. MORASCH ET AL., Defendants in Error. } #268; #9730.

10 #268; #9730.

In the District Court of Wyandotte County, State of Kansas, December Term, A. D. 1895.

OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin *or* Irene Morasch, Dec'd, Plaintiffs,
*vs.*
NEWMAN ERB, as Receiver of the Kansas City, Wyandotte and Northwestern Railroad Company, Defendant. } No. 10080.

Before Honorable Henry L. Alden, judge (and a jury).

*Case-made.*

Fred T. Leport, official sten. dist. ct., Kansas City, Kas.

Filed Apr. 11, 1894.

C. J. BROWN,
*Clerk Sup. Court.*

In the Supreme Court of the State of Kansas.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*vs.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin to Irene Morasch, Deceased, Defendants in Error.

*Petition in Error.*

The plaintiff in error above named represents that the defendants in error above named were plaintiffs in the district court of Wyandotte county, Kansas, in a certain suit therein pending against this plaintiff in error; that on the 19th dau of December, 1893, said defendants in error recovered a judgment against this plaintiff in error in the sum of one thousand and twenty dollars ($1,020.00) and

costs. A copy of the record and proceedings in said cause and a case-made therein, signed, settled, and certified by the court, is hereto attached, marked Exhibit "A," and made a part of this petition.

And the said plaintiff in error avers that there is error in said record, proceedings, and case-made, in this: that the said district court of Wyandotte county, Kansas, erred in each of the following matters, to wit:

11 1. The verdict and findings of fact are not sustained by sufficient evidence.

2. Error of law occurring at the trial and duly excepted to at the time.

3. Error of the court in receiving incompetent evidence over the objection and subject to the exception of the defendant.

4. Error of the court in refusing to give certain instructions asked for by the defendant.

5. Error of the court in giving certain instructions over the objection and subject to the exception of the defendant.

6. Error of the court in overruling the motion of the defendant for judgment upon the special findings of the jury.

7. Error of the court in overruling defendant's motion for a new trial.

8. Because the verdict is contrary to law.

9. Because the verdict is not sustained by sufficient evidence.

Wherefore said plaintiff in error asks that said judgment may be reversed and set aside and held for naught, and that said plaintiff in error be restored to all things he has lost by reason thereof, and that said court order such judgment herein as the trial court should have entered upon the record herein.

W. P. WAGGENER,
*Attorney for Plaintiff in Error.*

Filed Apr. 11, 1894.

C. J. BROWN,
*Clerk Sup. Court.*

EXHIBIT "A."

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13 December Term, A. D. 1893.

OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Plaintiffs,
*vs.*
NEWMAN ERB, as Receiver of the Kansas City, Wyandotte and Northwestern Railroad Company, Defendant.
No. 10080.

Before Honorable Henry L. Alden, judge (and a jury).

*Case-made.*

Be it remembered that on the 19th day of July, A. D. 1893, the plaintiffs above named began their action against the said defendant by filing with the clerk of the district court of Wyandotte county, Kansas, their petition herein, a copy of which is in words and figures following, to wit:

(Omitting caption, which is same as above written.)

Come now the plaintiffs above named and for cause of action herein against the said defendant states and alleges that said The Kansas City, Wyandotte and North-erstern Railroad Company is now, was on the 16th day of June, 1893, and theretofore had been a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and that the said defendant, Newman

Erb, as receiver of the said The Kansas City, Wyandotte and Northwestern Railroad Company, is now, on the 16th day of June, 1893, was, and theretofore had been the duly appointed, qualified, and acting receiver of said railroad company, expressly made liable for all injuries accruing in operating said railroad under and by virtue of a certain order of the United States circuit court in and for the district of Kansas of date March 21st, 1890, and made and entered in a certain action, No. 6472, in said United States circuit court, then and now pending, wherein The Farmers' Loan and Trust Company of New York was plaintiff and The Kansas City, Wyandotte and Northwestern Railroad Company *et al. was* defendants.

That heretofore, to wit, on or about the 16th day of June, 1893, Newman Erb, as receiver of the said The Kansas City, Wyandotte and Northwestern Railroad Company, was running, operating, and carrying on a general railway business along, over, and upon certain railway tracks of said company in the city of Kansas City, in the county of Wyandotte and State of Kansas, and was then and there running and operating said company's engines and cars upon, over, and along the railway tracks aforesaid; that then and there the said defendant had certain servants in his employ, which said servants had the care, custody, and control and management of the engine of said company number thirteen (13), with the train thereto attached, outgoing from said city on the railroad of said company.

That it was the duty of said defendant and his employés to so operate its said engine and cars as not to negligently do injury to life or property and to have at all times in his employ skilled, experienced, competent, and careful servants in and about the running and operation of its said engines and cars, and that it
14 was the duty of said defendant, in running said engine and cars upon said tracks within the city of Kansas City, to exercise care and caution and not to run through the said city at a high, dangerous, and reckless rate of speed.

And the plaintiffs aver that on the 6th day of June, 1893, in the city of Kansas City, in the county of Wyandotte and State of Kansas, the said Irene Morasch, now deceased, being then and there about twenty-two months of age, was upon the track of said railway company between 17th street and 18th street, in the city, county, and State aforesaid, when said engine number thirteen (13), with the train thereto attached, the same being the property of defendant and under the management, custody, and control of his said servants, approached the place where the said Irene Morasch was at a high, dangerous, and reckless rate of speed, to wit, at a rate of about eighteen miles an hour, and the servants of said defendant having the management of said trains and cars approached said point negligently and without giving any alarm or warning to said deceased Irene Morasch of the approach of said engine and cars, and without ringing any bell or keeping any bell ringing or blowing any whistle as the said train approached the place of the accident, but, on the contrary thereof, the said servants of said defendant having charge of said engine and cars, as aforesaid, and after the

said Irene Morasch had been observed or could have — observed by the exercise of ordinary diligence and vigilance of said servants near to or upon said tracks, and without ringing any bell, blowing any whistle, or sounding any alarm, as aforesaid, and without any any slackening of the speed of said train by said servants as the same approached said place between 17th and 18th streets, in said city, where said child was, and by reason of the negligent, careless, incompetent, and reckless management of said train of cars by said servants, then and there, at the place aforesaid, drove the said train of cars with great force and speed against, upon, and over the said Irene Morasch in her lifetime, so that by reason thereof *so* the said Irene Morasch was then and there so injured, maimed, and crushed that she then and there died at the city, county, and State aforesaid by reason of said injuries so received.

Plaintiffs further aver that the said Irene Morasch, at the time of her injuries and death aforesaid, was about twenty-two months of age; that these plaintiffs are the father and mother, respectively, and the next of kin of the said Irene Morasch, deceased; that no administrator has been appointed and no personal representative otherwise exists to administer upon the estate of the said Irene Morasch, deceased, but the said plaintiff, Otto J. Morasch, her father, and Eliza Morasch, her mother, are respectively the next of kin, to whom the damages recovered in this action are distributable according to law.

Plaintiffs aver that the death of the said Irene Morasch was occasioned by reason of the recklessness, wantonness, and negligence of the said defendant in the operation of said railroad engine and cars, and by reason of the recklessness, carelessness, and wantonness of the servants of the said defendants in charge of said train and cars; that the said train of cars was being driven and run at a high and dangerous rate of speed at the time of said accident through and within the corporate limits of said city of Kansas City, contrary to the ordinances of said city in such case made and provided, and that the said plaintiffs have been damaged by reason of the matters and things herein alleged in the sum of six thousand dollars.

Wherefore said plaintiff prays judgment herein against said Newman Erb, as receiver of the Kansas City, Wyandotte and Northwestern Railway Company, for said sum of money, to wit, six thousand dollars, together with the costs of this action.

McGREW, WATSON & WATSON,
*Attorneys for Plaintiffs.*

To the clerk of the district court:

Please issue summons in the above-entitled action, directed to the sheriff of Wyandotte county, Kansas, for the defendant above named, endorsed: "Suit brought to recover money for damages; amount claimed, $6,000.00," and returnable according to law.

McGREW, WATSON & WATSON,
*Attorneys for Plaintiff.*

(Indorsed:) Petition & precipe. Filed July 12, 1893. E. W. Towner, clerk, by H. J. Arnold, deputy.

And thereupon summons was issued out of said court in due form and thereafter duly returned, with the following endorsement thereon, to wit:

"STATE OF KANSAS, } ss:
*County of Wyandotte,* }

"Received this summons on the 12th day of July, 1893, at 10 o'clock a. m., and now return the same, without service, from want of time, and ask that alias issue, on the 22nd day of July, 1893.

S. S. PETERSON, *Sheriff,*
By A. W. PECK, *Deputy.*"

And thereupon plaintiff caused summons to issue, in due form, which was in due time returned, with the following return thereon, to wit:

"STATE OF KANSAS, } ss:
*County of Wyandotte,* }

"Received this summons on the 25th day of July, A. D. 1893, at 10 o'clock a. m., and served the same in my county as follows, to wit:

"I could not find the within-named defendant nor a place of residence of him in my county, and the said defendant and the within-named railroad company now having designated and appointed any person residing in said county upon whom summons can be served, I served said summons in said county by leaving a copy thereof, certified by me to be a true copy, at the freight depot, station, and office of said defendant and said railroad company, in said county, with J. C. Woodrow personally, who was in charge of said office and in the employ of said defendant as freight agent, on the 26th day of July, A. D. 1893.

S. S. PETERSON, *Sheriff,*
By C. PATTERSON, *Deputy.*"

| | |
|---|---|
| Copies | .25 |
| Service | .50 |
| Mileage | .50 |
| Total | $1.25 |

And thereupon the said defendant appeared specially and filed the following motion to set aside service, to wit:

16 (Omitting caption, which is same as first above written.)

*Motion to Set Aside Service of Alias Summons.*

Now comes the defendant, appearing specially for the purposes of this motion only, and asks the court to set aside the pretended service of summons herein for the following reasons, to wit: Because no service has been made upon this defendant in any manner as

provided by law, or upon any agent by him authorized upon whom service could be made.

Affidavits, oral and other evidence will be offered on the hearing of this motion.

W. P. WAGGENER,
*Attorney for Defendant, Appearing Specially for the Purposes of This Motion Only.*

(Indorsed:) Filed Aug. 21, 1893. E. W. Towner, clerk, by Wm. Needles, deputy.

And thereupon, to wit, on the 23rd day of September, A. D. 1893, said motion, being argued by counsel and considered by the court, was overruled, the defendant duly excepting.

And thereupon, by leave of the court, the defendant filed his answer to the petition of plaintiffs herein, a copy of which answer being in words and figures following, to wit:

(Omitting caption thereof, which is same as above written.)

*Answer.*

Now comes the defendant, and, for answer to the plaintiffs' petition filed herein, says:

First.

He denies each and every statement, allegation, and averment in said petition contained not hereinafter admitted and confessed.

Second.

He admits that said The Kansas City, Wyandotte and Northwestern Railroad Company is and was a corporation as in said petition alleged, and that he is and was the duly appointed, qualified, and acting receiver of said road, as alleged.

Third.

Defendant specially denies that there is any ordinance of the city of Kansas City, Kansas, regarding the speed of locomotives.

Fourth.

Defendant specially denies that the said engineer or fireman of said locomotive did run the same at an excessive rate of speed, or that either or both had any authority to run said locomotive at an excessive rate of speed.

Fifth.

For further answer, defendant says that if said deceased, Irene Morasch, was injured as alleged, the same was not the result of any carelessness or negligence on the part of this defendant or any of its agents or employees, but was the result solely of the negligence of said plaintiffs and their failure to use reasonable and ordinary care.

17 Sixth.

For further answer defendant says that the said deceased, Irene Morasch, at the time of said accident was on the private track of this defendant without right or authority or the permission of this defendant, his agents or employees, but was there with the consent and authority of said plaintiff and in violation of the ordinances of the city, and that the said injury was not the result of any carelessness or negligence on the part of this defendant, his agents or employees, but was caused solely by the negligence of said Irene Morasch's parents.

Wherefore defendant prays judgment for costs.

D. KELSO,
W. P. WAGGENER,
*Attorney- for Defendant.*

(Indorsed:) Filed Nov. 14, 1893. E. W. Towner, clerk, by E. J. Cable, deputy.

And thereupon in due time the plaintiffs filed their reply to the answer of defendant herein; which reply was a general denial.

And on the issue so joined said case came on for trial at the December term of said court before a jury, and the following proceedings were had, to wit:

Plaintiffs appeared by Watson, McGrew & Watson, their attorneys.

Defendant appeared by B. P. and W. P. Waggener, his attorneys.

The Honorable Henry L. Alden, district judge, presiding.

And thereupon the plaintiffs, to maintain the issue on their part, offered and introduced the following evidence, to wit:

OTTO J. MORASCH, called as a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct examination by GEO. WATSON, Esq.:

Q. State your name.
A. O. J. Morasch.
Q. Where did you live about the 16th of June, 1893?

By Mr. WAGGENER: The defendant objects to any evidence under the petition, because the same does not state facts sufficient to constitute any cause of action, and specially because the same does not allege that the plaintiffs or next of kin of the deceased have sustained any damages by reason of the death of the deceased.

Objection overruled by the court. Defendant excepts.

A. 1700 Stewart avenue.
Q. In what city, county, and State?
A. Kansas City, Kansas; Wyandotte county, State of Kansas.
Q. Was your family with you residing there at the time?
A. Yes, sir.
Q. Upon that day of what persons did your family consist?
A. Five.

Q. Name them.

A. I and my wife, Ellen Morasch, Conrad Morasch, and Irene Morasch.

Q. Do you know where the line of the Kansas City, Wyandotte and Northwestern is with reference to your house?

A. Yes, sir.

18 Q. Tell the jury where it is.

A. Why, my lot that I live on runs back—there is no alley there; the railroad is where the alley ought to be. There is no alley; there is a bank throwed up there eight or ten feet, I think, in my best judgment.

Q. What direction from your house is the railroad?

A. North.

Q. What is your business or occupation?

A. Painter.

Q. Are you a man of property?

Objected to by defendant as immaterial. Sustained.

Q. Where were you on the 16th day of June, 1893?

A. I was lying down on the bed; I was sick.

Q. Were you lying down at ten o'clock in the morning?

A. Yes, sir; about ten.

Q. How did you happen to be in bed?

A. I wasn't feeling well and I laid down.

Q. What was the matter?

A. Oh, a bad cold and sick headache.

Q. On that day how old was your daughter, Irene Morasch?

A. She was two years and a fraction of ten months.

Q. Do you know of this accident to her upon that day?

A. Well, at the time the accident happened, my wife said the train——

Objected to by defendant.

Q. After ten o'clock in the morning of that day, did you see your daughter, Irene Morasch?

A. Yes.

Q. Dead or alive?

A. Dead.

Q. Where?

A. Laying about the three lots west, on the railroad.

Q. Was there a train near her body?

A. Yes.

Q. Where was the child's body?

A. Laying about four to six feet in the rear end of the back coach.

Q. In the middle of the track, or outside, or where?

A. The legs and body laid between the two ties, and the head laid about the center of the track, and the collar-bone laid further up.

Q. How long before you saw her dead had you seen her alive?

A. Oh, I guess it was 15 or 20 minutes.

Q. Where did you last see her alive?
A. She was at my bed.
Q. Did you notice the number of the engine upon the train which was standing on the track?
A. Yes, sir.
Q. What was the number of that engine?
A. Engine 13.
Q. Of what road?
A. The Kansas City, Wyandotte and Northwestern.
Q. Do you know who was the engineer on that engine that day?
A. Yes, sir.
Q. Who?
A. William Richardson.
Q. Now, I wish you would tell the jury how long before June 16th, 1893, had you lived at 1700 Stewart avenue.
A. About two months; maybe a little over.
Q. Had you ever seen the railroad track there before?
A. Yes.
Q. Did you ever walk along it?
A. Yes, sir.
Q. Ever notice whether it was crooked or curved from that down towards the Wyandotte station?
A. Well, it is pretty straight for about two blocks or three.
Q. Do you know where the northern city limits of Kansas City, Kansas, are?
A. Yes, sir.
Q. Do you know where the western city limits of Kansas City, Kansas, are?
A. Yes, sir.
Q. Do you know where the southern limit is?
A. No; I don't.
Q. Well, between the northern—between the place where you lived, where this accident happened, is there any city north—I mean, south and east?
A. Yes, sir.
19 Q. What is that city north and east—I mean south and east?
A. It is called Kansas City, Kansas.
Q. Now, with reference to the west and northern city limits of Kansas City, Kansas, where is the place where this accident happened and where you lived?
A. Why, the accident happened at between 17th and 18th, and I don't know — what it ought to have been an alley there; it is a railroad, and I don't know the name of the street.
Q. How far, about, from where this accident happened is it to the western city limits of Kansas City, Kansas?
A. Well, 18th street cut through——
Q. What is the western city limit of Kansas City, Kansas?
A. I think it numbers 19.
Q. Nineteenth street?
A. Nineteenth and Stewart avenue.

Q. Is the place where this accident happened to your child west or east of 19th street?

A. East.

Q. Where this accident happened, is it north or south of the northern city limits of Kansas City, Kansas?

A. Why, it is south of the northern city limits.

Q. Have you recently noticed how far east the track of the Wyandotte and Northwestern Railroad Company you could see, standing where the child was killed?

A. I judge about 150 or 200 yards.

Q. At the place where this accident happened—describe that locality with reference to cuts and embankments upon either side of it or at that place; tell the jury how it is.

A. There is two cuts there, and there is a vacancy, I guess, of a hundred feet or maybe 200 feet, and the bank is banked up eight of ten feet right back of my house, and right in between the two cuts is where the child was killed, and the weeds was there two or three feet high at the time the accident happened, and there was five or seven panels of fence down, all gone but the posts; the wires gone.

Q. How high is the place where this accident happened above the general surface of the ground immediately off of the right of way?

A. It is kind of a hollow there—elevated about four feet, I judge, the track is.

By Mr. WAGGENER:

Q. The track is about four feet above the hollow?

A. Yes, sir.

Q. Now, you have mentioned a fence. Is there any fence in the rear of your lot?

A. In the rear of my lot?

Q. Yes.

A. Yes, sir; for about one lot, and then it is all torn away—the company's fence.

Q. Any wire upon the posts?

A. No, sir; nor for four or five panels, maybe seven panels; I didn't count them.

Q. Was the fence there at the time of the accident as you have described it?

Objected to. Objection sustained.

Q. Now, at the place of the accident and at the time of the accident, tell the jury what, if anything—what the condition of the right of way was with reference to herbage thereon.

A. Why, there was kind of weeds there all the way from two to two and a half and three feet — height. I never measured them.

Q. How close to the track were those weeds that high then growing?

Q. Right up to the ties, the ends of the ties, and some in the center.

Q. Which way was the train going which you saw standing there at the time of the accident—I mean which way was it headed?

Q. Where did you last see her alive?
A. She was at my bed.
Q. Did you notice the number of the engine upon the train which was standing on the track?
A. Yes, sir.
Q. What was the number of that engine?
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A. Yes.
Q. Did you ever walk along it?
A. Yes, sir.
Q. Ever notice whether it was crooked or curved from that down towards the Wyandotte station?
A. Well, it is pretty straight for about two blocks or three.
Q. Do you know where the northern city limits of Kansas City, Kansas, are?
A. Yes, sir.
Q. Do you know where the western city limits of Kansas City, Kansas, are?
A. Yes, sir.
Q. Do you know where the southern limit is?
A. No; I don't.
Q. Well, between the northern—between the place where you lived, where this accident happened, is there any city north—I mean, south and east?
A. Yes, sir.
19 Q. What is that city north and east—I mean south and east?
A. It is called Kansas City, Kansas.
Q. Now, with reference to the west and northern city limits of Kansas City, Kansas, where is the place where this accident happened and where you lived?
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Q. How high is the place where this accident happened above the general surface of the ground immediately off of the right of way?

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By Mr. WAGGENER:

Q. The track is about four feet above the hollow?

A. Yes, sir.

Q. Now, you have mentioned a fence. Is there any fence in the rear of your lot?

A. In the rear of my lot?

Q. Yes.

A. Yes, sir; for about one lot, and then it is all torn away—the company's fence.

Q. Any wire upon the posts?

A. No, sir; nor for four or five panels, maybe seven panels; I didn't count them.

Q. Was the fence there at the time of the accident as you have described it?

Objected to. Objection sustained.

Q. Now, at the place of the accident and at the time of the accident, tell the jury what, if anything—what the condition of the right of way was with reference to herbage thereon.

A. Why, there was kind of weeds there all the way from two to two and a half and three feet — height. I never measured them.

Q. How close to the track were those weeds that high then growing?

Q. Right up to the ties, the ends of the ties, and some in the center.

Q. Which way was the train going which you saw standing there at the time of the accident—I mean which way was it headed?

20 Q. When I first saw the train?
Q. Yes.
A. It was backing back to the child.
Q. On which end of the train was the engine?
A. The engine was on west end.
Q. What attracted your attention to the train?
A. My wife said the train had stopped. "There must be somebody killed." I got up and went to the door. The train was backing up then.
Q. Do you know the conductor who was in charge of that train that day?
A. Not personally acquainted with him.
Q. Do you know his name?
A. Yes, sir.
Q. State his name to the jury.
A. Frank Stall.

Cross-examination by B. P. WAGGENER, Esq.:

Q. How long had you resided there just previous to this accident?
A. About two months; maybe a little over.
Q. With your wife and three children?
A. Wife, yes, and three children; five of us.
Q. How old was the oldest child?
A. She was nine years old.
Q. The next oldest?
A. She is seven.
Q. Were they at home that morning?
A. No, sir.
Q. Where were they?
A. They had went for a bucket of water.
Q. Where to?
A. Down to the spring.
Q. Where is the spring?
A. I judge fifty yards or more from the house.
Q. Your wife was at home?
A. Yes, sir.
Q. This was about what time in the day?
A. About ten o'clock.
Q. You had had your breakfast?
A. Yes, sir.
Q. You were fully dressed yourself?
A. Yes, sir.
Q. So was your wife?
A. Yes, sir.
Q. What kind of day was it?
A. Why, it was cloudy.
Q. Any rain?
A. That afternoon it rained some.
Q. Was it raining that morning?
A. No, sir; I don't think it was.

Q. It was cloudy, however, that morning?
A. Yes, sir; some.
Q. When was this child born?
A. Born 1890.
Q. What month?
A. The 31st day of August.
Q. And its death occurred when?
A. The 16th day of June.
Q. What year?
A. 1893.
Q. What is the distance from the rear end of your house to the track, or was, at that time?
A. The rear end of the house?
Q. Yes.
A. Why, where the track is the alley ought to be.
Q. I ask you what the distance is between your house and the track.
A. You mean from the front of the house?
Q. From the rear of your house to that railroad track?
A. I guess it is about 120 feet; something like that. I think it is a 150-foot lot.
Q. Any houses immediately west of your house?
A. West?
Q. Yes.
A. Yes, sir.
Q. And east of it?
A. Yes, sir.
Q. Was there a partition fence between these houses east and west of you and your house?
A. No, sir.
Q. It was then open?
A. Yes, sir.
Q. Your children were in the habit of playing out in the rear of your house, were they not?
A. No, sir; they never—they played in front all the time.
Q. Never did play back?
A. No, sir.
Q. You did not allow them to do that?
21 A. Well, I didn't say where they should play around the yard or around about the yard in front.
Q. Then they had the right, so far as you were concerned, and permission from you to play where they pleased?
A. Well, no; I always tried to keep them around my yard as much as possible.
Q. They had permission from you to play in front of the house as well as in the rear?
A. Well, no; I don't know as I give them permission.
Q. You did not object to it, did you?
A. I objected to them going out of the yard.
Q. But they had permission to stay in the yard, front and rear?
A. Yes, sir.

Q. The track there at that point runs on a curve—that is to say your house set on the inside of the curve, does it not?

A. No, sir; the track is pretty straight there.

Q. Assuming that that table was your house, doesn't the track come up this way and then go off that way (indicating)?

A. No; the curve is way above, about 18th street.

Q. I know, but doesn't it begin to curve east of you some when it comes up from the city?

A. It is clear above my house where it curves.

Q. Now, you say there were two cuts back of your house?

A. One cut back of the house and one west of it.

Q. Was the first cut immediately at the rear of your house?

A. Yes, sir.

Q. How deep was that down to the track from the surface of the ground?

A. Eight or ten feet.

Q. And just room for the track to go through?

A. That is all.

Q. Made there by the railroad company?

A. Yes, sir.

Q. And then west of that it got down so that the surface of the ground was below the track some three or four feet?

A. It is between the two cuts they had the fill.

Q. Now, in this fill that you speak of there were high weeds two or three feet high?

A. Yes, sir.

Q. And these weeds extended right up to the ends of the ties, and some of them were between the ties?

A. Yes, sir.

Q. And right up at the edge of the ties the weeds were from two to three feet high?

A. Yes, sir.

Q. So that a child could go right up through those weed- on to the track and nobody see it, couldn't it?

A. Well, there was a well——

Q. Answer my question. Couldn't it?

A. Well, *it* it was out in the weeds it might.

Q. Now, there was no way for that child to get to that track except going through those weeds, was there?

A. Well, I judge she went up the path. There is a well-beaten path about three feet wide.

Q. Which way?

A. Run from Stewart avenue right up the track.

Q. There were weeds on each side of the path?

A. Yes.

Q. So that a person, a child of that age, would come right up that path and it could not be seen by a person walking up the track until it got right to the track, could it?

A. Well, it would have to go up that little fill, you know.

Q. There were weeds on each side of the path there right up to the track?

A. Yes, sir.

Q. Now, then, as a matter of fact, if that child had been walking from Stewart avenue right on that path until it got right up to the end of the ties, a person down here on the east end could not
22 see it until it got right up to the ties, could he?

A. Well, I guess they could have seen it after it got on the track.

Q. I know, but not until it got on the track. What is your opinion about that?

A. I know—I don't believe it could until it got right on top of the fill. The weeds wasn't quite as high, only about three feet.

Q. So that a little baby child, like that, walking along would be entirely concealed from a person coming up that track until it had stepped up onto these ties?

A. Well, you see the weeds wasn't only on the right of way. They was moved off on the property around there.

Q. Didn't you just testify a few moments ago these weeds were two or three feet high, up to the ends of the ties?

A. Yes, sir; on the right of way.

Q. I mean on the right of way.

A. Yes, sir.

Q. Now, a child on the right of way could not be seen there by a person coming up there either on the track or on an engine until it got right onto the ties, could it?

A. No; I don't believe it could.

Q. Had you known of your child being down there before that?

A. No, sir; it never went there before.

Q. You watched it and tried to keep it away from there?

A. Yes, sir.

Q. Do you know of your children going there to put their ears down to the track to hear the trains coming?

A. No, sir.

Q. Never heard of that?

A. No, sir.

Q. Well, what effort did you make that morning, either you or your wife, to keep that child in the house?

A. Why, I was laying down. I didn't know the child was out.

Q. Well, you made no effort yourself because you was lying down.

A. Why, I told it to come and lay down with me and go to sleep and it would not do it.

Q. That is the only effort you made and you don't know what efforts your wife made?

A. No.

Q. It would not have been difficult to have kept the child in the house, would it?

Objected to by plaintiff as incompetent, irrelevant, and immaterial. Objection sustained by the court. Defendant excepts.

Q. Was there a rear door to your house?

A. Yes, sir.

Q. How far was that rear door from this path that led down from Stewart avenue to the track?

A. Why, I judge there was about three lots, something like that.

Q. Three lots between your house and the path?

A. Yes, sir.

Q. Was there a path that led from your house down to this path?

A. Yes, sir.

Q. Was that used by you frequently when you went out?

A. Yes, sir; and neighbors.

Q. So that it would be natural, wouldn't it, for the child, if it got out of the rear door, if it got into the path, to follow right around down to the track?

Objected to by plaintiffs as incompetent, irrelevant, and immaterial and as calling for a conclusion of the witness. Objection sustained by the court. Defendant excepts.

Q. Was there any other way that that child could get down to that track in the condition the weeds were on, other than by this path?

A. Why, no. That is the path that all the neighbors used.

Q. And there was no other way for the child, if it went out of the rear door of your house, to get down to that track except

23 down this path?

A. Well, I couldn't say whether there is any other way of getting down there or not.

Q. This was a regular train, was it?

A. Yes, sir.

Q. It passed there about what time?

A. Why, it generally comes in about half past eight and goes out about 10—somewhere along there; I don't know the time.

Q. It was the train that was going out about 10 o'clock that caused this death?

A. The Leavenworth passenger—rapid transit.

Q. That went out every morning, didn't it?

A. Came in every morning and went out.

Q. You knew while you were lying there on the bed it was about time for the train to pass there?

A. No, sir.

Q. You knew that was the regular time, didn't you?

A. Well, I wasn't studying about no train.

Q. You didn't think about that?

A. No, sir.

Q. You didn't give it any thought at all; you had known that train to pass there every morning when you were at home?

A. Well, I never kept track of it at all.

Q. Now, but you generally knew the train was due at certain hours?

A. Well, I don't know, not being a railroad man; I didn't notice what time it did come by.

Q. I know, but here this train went by your house, within 125 feet, every morning while you lived there, didn't it, once or twice?

A. Yes, sir; when it wasn't late; sometimes it was late.
Q. I mean when it was on time?
A. Yes, sir.
Q. You knew when it was on time?
A. Yes, sir.
Q. You knew about the time that you was lying there on the bed, or might have known if you had thought of it, that train was due there about that time?
A. No, sir; I didn't.
Q. You didn't know it?
A. No, sir.
Q. You didn't think about it?
A. I didn't think about it.
Q. Did you hear the train as it came up to the city that morning?
A. No, sir.
Q. Did you hear any whistles?
A. No, sir.
Q. Any bells?
A. No, sir.
Q. When was your attention first called to the fact of the train passing there?
A. Why, my wife come and called me; said the train was stopped and she guessed somebody was killed. I went up there, and it was my child.
Q. That was the first intimation you had there the train was coming?
A. Yes, sir.
Q. Now, the child was not struck or injured at any street crossing, was it, either 17th or 18th street?
A. No, sir.
Q. It was on the private right of way of the company, wasn't it?
A. Well, I don't know whether that is a street going where that path is or not.
Q. I know, but there is no street crossing?
A. There is no street crossing there.
Q. There has never been a street opened up there?
A. No, sir; not Eighteenth street is opened up.
Q. I mean a street running the way the track runs?
A. No; there is no street opened up.
Q. There is no way to drive or walk; there are deep cuts and high embankments there, are there not?
A. Yes.
Q. How far is this path that you speak of from the street next west of it that is opened for crossing?
24 A. Oh, I couldn't say exactly; it is about two thirds; it is easy two-thirds of the block.
Q. How many feet, about?
A. I couldn't say; maybe a hundred yards.
Q. About 300 feet; now, you mean to say that the 18th Street crossing is 300 feet east of this?

A. West.
Q. How far was the 17th Street crossing east of it?
A. It is the next crossing east of it; is about four or five blocks.
Q. Well, 17th and 16th streets, so called, have never been opened, have they?
A. No, sir.
Q. And it is some four or five or six blocks east of this before you come to any other street crossing?
A. Yes, sir.
Q. What kind of a crossing is this 18th Street crossing that you speak of 300 feet west?
A. Why, it is opened up for travel; it is not paved nor nothing.
Q. Is it crossed there by teams?
A. Yes, sir.
Q. Now used very much?
A. Well, I don't know about that.
Q. That is the extreme northwest limits of the city, is it not?
A. No; it is further on than that.
Q. But there isn't much of a population up there?
A. Yes; it is pretty well filled up along there where I lived—Stewart avenue.
Q. How many houses on the north side of the track?
A. The north side?
Q. Yes.
A. There is none right there in that neighborhood; there is a street or two above.
Q. I mean south of Stewart avenue.
A. South of Stewart?
Q. Yes.
A. I guess there must be a couple of hundred along in there between 16th——
Q. Between that and the track?
A. No; you mean south?
Q. I mean north of the track.
A. There is none in there.
Q. Well, it is thinly populated, then, right along by the track, is it not?
A. In south of the track it is pretty well populated.
Q. But north of it?
A. North of it it ain't.
Q. And but very *very* houses northwest of it?
A. Yes; that is pretty well settled in there.
Q. Northwest?
A. No; that ain't.
Q. What kind of a grade is it there going west, up or down grade?
A. Going west on the railroad?
Q. Yes.
A. It is upgrade.
Q. It is upgrade from 16th street to 18th street?
Q. From about 9th street, I think.

Q. That is quite an ascending grade there, isn't it, up until they get outside of the city?

A. Yes, sir.

Q. Coming up there the engines make a great deal of noise, do they not, puffing and the exhaust of steam?

A. The freight does.

Q. All trains do?

A. I never noticed passenger trains very much.

Q. Now, this accident, as I understand you to state, occurred about 300 feet east of the 18th Street crossing?

A. Well, about two-thirds of the lot (?); it may be more than a hundred yards.

Q. At all events, it did not occur at any public street crossing?

A. No; unless they would call that path a crossing; everybody used that there; all the neighbors used that path across there.

Q. That was kind of by-path across there; it had not been opened up by the city for crossing, that path?

A. No; I don't think it had.

Q. It was not used for crossing by teams?

A. No, sir.

Q. Teams could not cross there?

A. No, sir.

Q. And did not cross there?

A. No, sir.

Q. That path is used to get access to that one house up there, isn't *that*, to enable you to get down to the spring?

A. No, it is pretty well settled up in on between there and the boulevard.

Q. Did your children cross this track to go to the spring?

A. No, sir.

Q. Did not have to do that?

A. No, sir.

Q. How far was the spring from the place of this accident?

A. I guess it is about 150 yards.

Q. In which direction?

A. South—south of my house.

Q. Let me understand you; is your house south or north of this track?

A. South of the track.

Q. I have understood all along it was north 99; which way does it front?

A. It fronts south.

Q. How many houses in that block south of that track?

A. Well, I couldn't tell; I never counted them; it is pretty well populated around there.

Q. Only two in that block, are there not?

A. In that block?

Q. In that block; I mean south of the track.

A. You mean south of Stewart avenue, on the south side of Stewart avenue?

Q. No, sir; south of the track and north of Stewart avenue, in the same block that your house is, between 17th and 18th?

A. There is four there.

Q. Then how many houses immediately north of the track, north of your place?

A. Why, I couldn't say how many is up in there.

Q. There is only one house right immediately north, is there?

A. Yes, there is one house up there.

Q. Then this path you speak about was used by people going to that house?

A. And near Quindaro boulevard, it is pretty well populated up in there.

Q. Whereabouts was this train when you went out with reference to this path?

A. Why, it was—the passenger train that killed the child?

Q. Yes.

A. It was west of the path.

Q. How far?

A. Oh, I guess it was 10 or 12 feet.

Q. How many coaches to that train?

A. Two.

Q. Were they loaded with passengers?

A. I see some passengers get out; I never counted them.

Q. The train then had stopped some 10 or 12 feet west of the path?

A. Yes, sir.

Q. Now, could you tell from the marks on the rails there, blood or anything of that kind, where that accident occurred first, where the child was struck?

A. I believe I could.

Q. Whereabouts, with reference to this path?

A. Why, it was a little east where we first found blood.

Q. How far east?

A. I guess about ten ties from where—ten or fifteen ties from where the body was.

Q. How far east of the path?

A. Ten or twelve ties; I guess they run about two feet.

Q. Ten or twelve ties east of the path?

A. Yes, sir.

Q. What was the condition of the ground with reference to the weeds; were the weeds grown up there to the end of the ties?

A. Yes, all along there.

Q. From two to three feet, right up to the end of the ties?

A. Yes, sir.

Q. How was the track, surfaced up between the ties?

A. Why, there was small grass—you mean in the center of the track?

Q. Yes.

A. Small grass in the center.

26 Q. Had the ties been surfaced up with dirt so that the first was even with the surface of the ties clear underneath the "T" rail?

A. Which do you mean—a kind of bank or pile made in the center?

Q. Yes. Was there a pathway in the center of the track?

A. In some places.

Q. Then underneath the iron rail it was vacant—there was no dirt there? Understand what I mean. Assuming that this here is the track, here is the rail; was there any dirt underneath this rail between the ties?

A. I did not notice.

Q. Now, then, as I understand you, the weeds grew up on the outside of the iron rail and some on the inside from two to three feet?

A. Yes, sir.

Q. What expense did you incur in clothing and supporting that child per month?

A. Well, sir; I never itemized it.

Q. About what would it cost you?

A. I couldn't say.

Redirect examination by Mr. WATSON:

Q. Was there ever any administrator appointed over the estate of your child after it was killed?

A. No, sir.

Q. Your house, you say, is 1700 Stewart avenue?

A. Yes, sir.

Q. It corners on Stewart avenue and 17th street?

A. Yes, sir.

Q. Facing Stewart avenue on the south, between 17th and 18th street—I mean facing north on Stewart avenue—tell the jury about how many houses are between the 17th and 18th streets.

A. Between 17th and 18th?

Q. Yes.

A. The whole block, I don't think there is more than 4 or 5 vacant lots there; they are all filled up.

Q. North of the railroad track and west, how many houses are there, say, within four or five hundred feet of the railroad track?

A. Which—west of me?

Q. West and north, across the track?

A. Well, there is four west.

Q. On the north side of the track?

A. On the south side.

Q. Now, on the north side of the track, west of 17th street and say north for four or five hundred feet, how many houses are there in the neighborhood of the track?

A. I never counted them.

Q. Well, about how many?

A. Well, it is pretty well populated down there on the north side of the track from 16th street, and 15th—it is pretty well populated there.

Q. How between 16th and 17th?

A. There is none.

Q. Now, between 17th and 18th, west on the north side of the track?

A. One.

Q. How close is that to the track?

A. Why, I guess it is a couple of hundred feet; maybe more.

Q. In what direction was it from where the child was killed?

A. That one north?

Q. Yes.

A. Why, it was north.

Q. Immediately north?

A. Yes, sir.

Q. Now, on the south side of the track east of 17th street, how many houses were there in there between 15th and 16th?

A. Well, that was pretty near every lot filled up there.

Q. Between 16th and 17th?

A. No; there is only one store building—a store-room.

Q. Between 16th and 17th, on the south side of the track?

A. Yes.

Q. Now, on the south side of the street, but facing north on the street, between 16th and 17th, how many are there?

A. That is all filled up, too. There may be a few vacant lots there—three or four; something like that. They are pretty well filled up.

27 Q. Was this child able to talk that was killed?

A. Yes, sir.

Q. Had you ever said anything to it about going upon the railroad track?

A. No, sir.

Q. Had you ever said anything to it about its going outside of the yard?

A. Yes, sir; I always told it to stay around the house and in the house when I would go to work.

Recross-examination by Mr. WAGGENER:

Q. You understood that was a very dangerous place there, didn't you?

A. No, sir.

Q. Didn't think about it?

A. No.

Q. It was a very dangerous place, wasn't it, for children?

A. Well, the dummy line was more dangerous than that.

Q. There is a dummy line close by that?

A. Yes, sir.

Q. How near?

A. Near a hundred feet in front.

Q. So you had a train in front of you and one at the rear?

A. Yes, sir.

Q. You lived in a very dangerous locality there, so far as children are concerned?

Objected to by plaintiffs as incompetent, irrelevant, and immaterial. Objection sustained by the court. Defendant excepts.

Q. You say this child could talk?
A. Yes, sir; talk some.
Q. It wasn't old enough to appreciate the significance of whistles or bells—it wouldn't know what a bell meant if it was ringing, would it?
A. I don't know.
Q. It would not know what a whistle meant, would it?
A. I don't know, I am sure.

Witness excused.

Mrs. ELIZA MORASCH, called as a witness on behalf of the plaintiffs, and being duly sworn, testified as follows:

Direct examination by GEO. B. WATSON, Esq.:

Q. What is your name?
A. Eliza Morasch.
Q. You are the wife of Otto J. Morasch?
A. Yes, sir.
Q. And the mother of Irene Morasch?
A. Yes, sir.
Q. Do you remember the death of your child upon June 16th, 1893?
A. Yes, sir.
Q. That was the date, was it?
A. Yes, sir.
Q. Where did you see your child immediately after its death?
A. Lying on the track.
Q. What were you doing that morning, immediately before the accident, when you last saw it alive?
A. I saw her step over the doorstep.
Q. How long was it when you saw it step over the doorstep before you saw it dead?
A. About ten or fifteen minutes.
Q. Had you ever known of the child going away from the house before?
A. No, sir.
Q. Had you known of its going out of the yard before?
A. No, sir.
Q. Did you ever say anything to it about going away from the house?
A. Yes, sir.
Q. What had you told it about going away from the house?
A. I told her to stay in with its mother.
Q. Did you ever speak to it about the railroad tracks?
A. Yes, sir.
Q. What did you say to it about them?
A. I told her she must not go out on the track.
Q. How old was this child when it was killed?

A. It would have been three in August.
28 Q. On what day was it born?
A. The 31st.
Q. What year?
A. 1890.

Cross-examination by B. P. WAGGENER, Esq.:

Q. You say you had frequently told this child not to go down on the track?
A. Yes.
Q. Why did you do that?
A. Well, so she would never go off.
Q. Was she in the habit of doing it?
A. No, sir.
Q. What made you think she would do it?
A. No answer.
Q. Had you seen the other children go down there?
A. No, sir.
Q. Never had seen any children going down there?
A. No, sir.
Q. The children were not in the habit of going on the track, then?
A. No, sir.
Q. And were not in the habit of playing around the track?
A. No, sir.
Q. You never saw any children there at all?
A. No, sir.
Q. You never saw anybody using that track there?
A. Well, they would walk on it.
Q. Children?
A. No, sir.
Q. Children never went about it?
A. No, sir.
Q. As long as you lived there you never saw or heard of children being about the track?
A. No, sir.
Q. Not only your children, but nobody else's children?
A. No, sir.
Q. It was not a place where the children usually went?
A. No, sir.
Q. So that an engineer in coming along there wouldn't have any reason to expect children on the track, would he?

Objected to by plaintiffs as incompetent, irrelevant, and immaterial and calling for a conclusion.
Objection sustained by the court. Defendant excepts.

Q. When you saw this child step off the doorstep, which step was that—the north or south side?
A. The north side.
Q. That is, the kitchen step?
A. Yes, sir.

Q. Out in the back yard?
A. Yes, sir.
Q. What were you doing at that time?
A. I was sitting down just then.
Q. Didn't have anything to do particularly?
A. I had been ironing.
Q. But you was not doing anything at that time?
A. No, sir; I was sitting down.
Q. Were you on the front, outside or in the house?
A. In the house.
Q. And did you say anything to the child when she went out?
A. No, sir.
Q. Did you tell her not to go down to the track then?
A. Not that morning.
Q. How long had the other children been away?
A. About 20 minutes, I guess.
Q. You sat there in the room about how long before you heard of the accident?
A. Just a few minutes.
Q. Ten or fifteen?
A. No; it wasn't that long.
Q. You knew the train was due there about that time?
A. No, sir; I never noticed; I was busy.
Q. But you knew the train came along every morning in the morning, didn't you?
A. Yes, sir.
Q. You knew there was two or three trains—one coming in and one going out of a morning—every morning?
A. Yes, sir.
Q. And it was about that time of day when one train went out?
A. Yes, sir.
Q. You did not think about that when your child went out over the step?
A. No, sir.
29 Q. You just sat there; you did not look for it any more until after the accident?
A. No, sir.
Q. You did not have anything particularly to do after the child was gone until you heard of the accident, except to sit in the chair?
A. I was sitting there; I had a headache.
Q. Was your husband in the same room?
A. No, sir.
Q. He was in the other room?
A. Yes.
Q. Did you notice which way the child went away?
A. No, sir.
Q. You paid no attention to that?
A. No, sir.
Q. What kind of a day was it?
A. It was kind of cloudy, I believe.
Q. A warm, pleasant day, though; wasn't it?

A. Yes; I think it was.
Q. You did not notice which way the child went when it got out?
A. No, sir.
Q. You gave it no more attention whatever after that?
A. No, sir.
Q. You did not try to find out where it had gone?
A. I don't remember.
Q. Do you know where this path is that leads down from your house to the track?
A. Yes, sir.
Q. Did it go in that direction?
A. I don't know.
Q. You gave it no attention whatever?
A. No, sir.
Q. If you had gotten up as soon as it got out of the steps you of course could have brought it back into the house, couldn't you?
A. Yes; if I had noticed it.
Q. If you had noticed it you would not have let it go down that way, would you?
A. I don't know.
Q. If you had seen the child going down that way would you have stopped it *if you had seen the child going down that way would you have stopped it* after it got out of the house?
A. No, sir.
Q. Why?
A. Because it never went away from the house.
Q. You knew it would be dangerous down there by that track, didn't you?
A. Yes, sir.

Redirect examination:

Q. From what source did you and your husband derive your livelihood; your husband and you were dependent upon your day's work?

Objected to by defendant as incompetent, irrelevant, and immaterial, and not within the issues of this case.

By the COURT: The question here is as to what damage has been sustained by these plaintiffs by reason of the death of this child. One of the elements of that probably would be, when the child became of an age in gaining a liv-lihood, as to the necessity of its assistance. I think it is competent.

By Mr. W. P. WAGGENER: That evidence would be competent if these gentlemen had alleged in their petition that these plaintiffs, as next of kin, were dependent upon the child for support and maintenance. But here is a child 23 or 24 months old that is suddenly killed, and the fact that the parents at this time are dependent upon their personal labor for a living would not tend to prove that they sustained pecuniary loss by reason of the death of this child.

By the COURT: I think it is a circumstance for the jury to take

into consideration in determining the question of damages. As to the fact of its not being set out in the petition, I do not think the objection is good. The petition alleges that the plaintiffs are the next of kin of the deceased, and that they have been damaged by reason of the death of the child in a certain amount. In the absence of a motion to make that more definite and certain, I think the allegation must be held sufficient. She may answer.

30 To which ruling of the court defendant excepts.

Q. What means of gaining a liv-lihood have you and your husband?

Objected to by defendant on grounds last above stated. Objection overruled. Defendants excepts.

A. No, sir.

(Witness excused.)

WILLIAM RICHARDSON, called as a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct examination by GEO. B. WATSON, Esq.:

Q. What is your name?
A. William Richardson.
Q. You were subpœnaed as a witness in this case?
A. Yes; I was subpœnaed last—well, I was not today.
Q. You were here when this case was put over until this morning?
A. Yes, sir.
Q. Did you hear the judge tell you to return?

By WAGGENER: We object to that, as he is here now. It is my fault, perhaps, he was not here.

The WITNESS: Somebody else told me. I didn't hear the judge.

Q. You say your name is William Richardson?
A. Yes, sir.
Q. Where do you live?
A. Leavenworth, Kansas.
Q. Live in Leavenworth now?
A. Yes, sir.
Q. Are you in the employ of the Wyandotte and Northwestern Railroad Company now?
A. Yes, sir.
Q. Were you in the employ of that railroad company on the 16th of June, 1893?
A. Yes, sir.
Q. In what capacity?
A. Engineer.
Q. Running out what engine?
A. Thirteen.
Q. Were you in charge of that engine on the outgoing train that left this city upon June 16th, 1893?

A. Yes, sir.

Q. About ten o'clock a. m.?

A. Yes, sir.

Q. Was that a freight or passenger train?

A. Passenger.

Q. Do you remember the killing of a little girl near 17th street, in this city, by your engine that day?

A. Yes, sir.

Q. How fast was your train going immediately before the accident?

A. Well, before the accident, I was going probably about six to eight miles an hour until I got to 13th street; after I left 13th street I went a little faster, and after I got outside of part of the town, probably I was going between 12 and 15 miles an hour.

Q. Between 12 and 15 miles an hour?

A. When I first seen it; yes, sir; but I slacked up some before it happened.

Q. Now, as you neared the place of this accident, did you see any object upon the track or near the railroad?

A. No, sir; I seen that baby—I didn't see it—it wasn't on the track; it came on the outside of the track. I seen it first when it come out of weeds and got up on the track. I thought it was a chicken and I hadn't slacked up any; than, at that time, I seen it raise up and stand on its feet; I seen it was a child; then I was about three rails' lengths—about ninety feet—from the baby then.

Q. About 90 feet from the baby when you saw it was a baby?

A. Yes.

Q. How far were you away from what you took for a chicken when you first saw it?

A. Well, I was about two or three more rails' lengths when I first saw it.

Q. Well, probably 150 or 200 feet?

A. No; probably 120 feet.

31 Q. One hundred and twenty feet?

A. One hundred and twenty or one hundred and forty feet.

Q. How long have you been an engineer?

A. About ten years.

Q. How old are you?

A. Thirty.

Q. About how many rail-lengths east of the child were you when you first saw what you took for a chicken?

A. About five or six.

Q. Do you know the length of those rails?

A. Yes, sir; 30 feet.

Q. Now, when you saw that it was a child, you say you were about three or four rail-lengths away from it, were you?

A. About three or four rail-lengths; yes, sir.

Q. What did you then do?

A. I shut my engine off and applied my air to make a stop as quick as I could.

By Mr. WAGGENER: What is that?

A. I shut my engine off and applied the air as quick as I could, after I seen what it was.

Q. The road is upgrade a little there, is it not?

A. Yes, sir.

Q. Were the brakes in good condition that morning?

A. Yes, sir.

Q. The air worked perfectly?

A. Yes, sir.

Q Now, say, going 12 miles an hour with the engine and brake in the condition that your train was that morning, there being two coaches upon it, in what distance can you stop your train on an upgrade as that was?

A. Going 12 miles an hour?

Q. Yes, sir.

A. Well, about an engine and two or three coaches' lengths—about 200 feet.

Q. Now, where was the place where you struck the child; how far east of the rear coach of the train was that place when you stopped your train?

A. About 30 feet. I don't know exactly it was a rail-length or not; it was not any more than a rail-length.

Q. How long is one of those coaches?

A. They are about 60 feet a coach.

Q. How many coaches or cars in the train that day?

A. Two.

Q. How long is the engine 13?

A. About 70 feet. I guess a little bit longer than a coach.

Q. Between the place where you first saw this object upon the track which you mistook for a chicken and the object could you have stopped your train?

A. I stopped just as quick after I noticed the child at first, when it came out of the weeds. I couldn't probably stop the engine. I could have stopped before the train run over it. I could have stopped between the engine and the first car. I didn't know what it was when I first seen it come out of the weeds. I thought it was a chicken.

Q. Now, with the train going six miles an hour, composed of an engine and two coaches, on a grade like that was and with your air and brakes in perfect condition, in what distance can you stop the train?

A. Well, stop the train in about 40 or 50 feet—six miles an hour.

Q. You say there were weeds along the side of the track?

A. Yes, sir; there was.

Q. At that time?

A. Yes, sir.

Q. Was this accident on a fill between the cuts?

A. I think it was right between the two cuts, on a curve.

Q How high were the weeds?

A. Oh, about three feet, I guess; two or three feet. About two feet, I guess they was.

Q. Do you know where a brick house stands south of the track, down through that open space between the curves, at which a family by the name of Klinhler lives?

A. Yes, sir.

Q. Can you see that house from the railroad?

A. Yes, sir.

32 Q. Can you see it before you entered the first cut between which this accident happened?

A. I couldn't say about that; it is on the fireman's side going out and I never noticed. I know you can see the house from the track.

Q. Did you see that house that morning?

A. I don't know whether I did or not; I don't remember whether I looked over that way or not. I know I didn't going out; I might coming in there.

Q. Did you see that house at all that morning?

A. No; not until after this accident happened.

Q. Is there a young lady in that family by the name of Rosa?

A. Yes, sir.

Cross-examination by Mr. WAGGENER:

Q. How many years' experience have you had as a locomotive engineer?

A. Ten years' right now.

Q. This was a regular passenger train?

A. Yes, sir.

Q. On time?

A. Yes, sir.

Q. On which side of the engine are you located when in your proper place?

A. The right side.

Q. From which side of the track did this child come?

A. The left side.

Q. Now, how far do you say that child was from you when you first discovered the object?

A. About six or seven rail-lengths; probably 150 or 160 feet when I first seen it.

Q. Where was the object then?

A. Coming up the side of the track in the weeds; come out of the weeds. There is weeds about four feet from the tie; there is some weeds along the track; near the ties there was no weeds.

Q. How far was the object from the track when you first saw the object?

A. About four or five feet.

Q. That was on the left-hand side from you?

A. Yes, sir.

Q. Now, how near to that child was you when you first discovered it on the track?

A. About, well, about 70 feet or 80 ft.; not quite three rail-lengths.

Q. When you first discovered it on the track?

A. Yes, sir; on the track.

Q. Now, at that time what did you do?

A. I put my air on, shut the engine off, and reversed her as quick as I could.

Q. Was there anything else you could have done at that time to stop that train?

A. No, sir; I done everything I could.

Q. Was it possible to stop the train with the appliances then at hand and prevent that collision?

A. No, sir; no way to prevent it.

Q. As you went up that road, did you keep a constant lookout for objects on the track?

A. Yes, sir.

Q. Were you in your proper place?

A. Yes.

Q. Looking ahead?

A. Yes, sir.

Q. Where was the fireman?

A. He was ringing the bell on his side.

Q. Was the whistle blown?

A. Yes, sir.

Q. For what distance was that bell rung from the time you started from the depot here in the city up?

A. Continually; all the time.

Q. Continuously through the city?

A. Yes, sir.

Q. Was there any public crossing or public ground at this place where this accident happened?

A. No, sir; the street ain't cut through there—17th street ain't cut through. Eighteenth street was probably a hundred feet from there, west of there.

Q. This accident occurred on the private right of way of the company?

33 A. Yes, sir.

Redirect examination:

Q. Do you know the weight of these coaches?

A. The weight? No, sir.

Q. Do you know the weight of your engine?

A. No; not exactly; she is about a 35-ton engine.

Q. Were they or were they not large passenger coaches?

A. A standard coach.

Q. Do you know about what they weigh?

A. No, sir; I have no idea.

Q. Now, you say the weeds were how high?

A. About two feet.

Q. Going up to the ends of the track?

A. No, sir; they was probably four or five feet from the rail—the weeds was.

Q. Where was the child when you first mistook it for a chicken, in the center of the track?

A. No, sir; it was coming out of the weeds—coming up onto the track.

Q. It came up onto the track immediately?

A. Yes, sir.

Q. Now, do you remember from the point where the child was when you first saw it how far down the track you can see with the road in its present condition; the weeds are cleared off now, aren't they?

A. Cleared off then, off the track; you could see all right on the curve.

Q. How far from the point where this chicken was the object that you took for a chicken—how far down the track east can you see?

A. About 120 or 130 feet—about five or six rail-lengths.

Q. Isn't it a fact that right at the point where the child was there is where the curve commences?

A. The curve commences before we got there; the curve commences a little east of that.

Q. A little bit east?

A. Yes, sir.

Q. About how far east?

A. Six or seven rail-lengths.

Q. Well, at the point where the child was the curve is not sharp, is it?

A. Yes, sir; a sharp curve right on the curve.

Q. Isn't it a fact from the point where the child was, where you saw it come up out of the weeds, you can see down to 13th street?

A. No, sir; you can't.

Q. Sure about that?

A. No, sir.

Q. How far down can you see?

A. You can see about 120 feet from there; six or seven rail-lengths is all the far you can see right on the curve.

Recross-examination:

Q. At that time, I understand you to say, the weeds had grown up on either side of this track quite a distance up and down?

A. Yes, sir.

Q. How high were these weeds?

A. About two feet.

Q. How near to the track?

A. About four or five feet from the track.

Q. From the rails?

A. Yes, sir.

Q. There was a cut there, was there?

A. Yes, sir.

Q. How deep a cut is that?
A. About 25 feet—higher than the engine some, anyway.
Q. How long a cut is that?
A. About 120 or 130 feet.
Q. You come onto that cut from the east and curve around to it?
A. Yes, sir.
Q. At the place where the child was struck there was no cut, as I understand?
A. No, sir; that was between the cuts.
Q. There were two cuts there and this was between the two?
A. Yes, sir.

Redirect examination:

Q. Did you see the chicken all the time from the time when you first saw it until you saw it was a baby?
A. Yes, sir.

34 Recross-examination:

Q. It is a very short space of time, isn't it—running that distance a very few seconds?
A. Very few seconds. It wasn't over a minute.
Q. It was in the weeds all the time you supposed it was a chicken or something else than a human being?
A. I saw it come out of the weeds, but I thought it was a chicken.
Q. The very moment you discovered it was a human being you applied all the appliances to stop that train?
A. Yes, sir.

(Witness excused.)

FRANK S. STALL, called as a witness on behalf of the plaintiffs, and being duly sworn, testified as follows:

Direct examination by Mr. WATSON:

Q. Are you in the employ of the Kansas City, Wyandotte and Northwestern Railway Company as receiver?
A. Yes, sir.
Q. Were you in the employ of that company or its receiver on June 16th of this year?
A. Yes, sir.
Q. Were you in charge of the outgoing passenger train at 10 o'clock in the morning upon that day?
A. I was.
Q. Do you remember of this accident that occurred to Irene Morasch out there?
A. I do.
Q. Near 17th street?
A. Yes, sir.

Q. What were you doing or what was your first warning there was any trouble?

A. I had just worked up my train and went into the mail-room and was looking through my tickets, and I felt the engineer apply his air very suddenly and stronger than usual, and I looked out the side door of the mail car—the mail-room——

By Mr. WAGGENER: Which side, the north or south?

A. The north side, and I couldn't see anything. We came to a dead stop, and I went out and asked what was the matter. *A.* He says, "Killed a child." I ran back through the train and jumped off the rear end, and I see a child lying there not more than a half coach-length from the rear of the train.

Q. Had you backed up any then?

A. No, sir; didn't at all. The child was just a very short distance from the rear end of the train.

Q. How long have you been in the railroad business?

A. About nine years—eight or nine years.

Q. How long have you been working for that company?

A. 4 years.

Q. At the time when you heard the engineer apply his air, at what rate of speed was the train going?

A. Well, to the best of my remembrance it was about 15, or possibly 18, miles an hour. I wasn't noticing very closely.

Q. You think it was going at least 15 miles an hour?

A. I should judge about 15 miles an hour.

Cross-examination by Mr. WAGGANER:

Q. Was the bell ringing as you went out?

A. Yes, sir; the bell was ringing from the time we left Wyandotte depot.

Q. Do you know whether the engine was reversed and appliances used to stop that train?

A. I think he did everything a man possibly can do to stop it when he see it.

Q. What was the condition of the ground on either side of the track there as to weeds when the child was struck?

35 A. There were some high weeds on the left side, the side the child came out on.

Q. About how high were these weeds?

A. Well, possibly 3 feet; I don't remember.

Q. From your experience as a railroad man do you think that train could have been stopped any sooner than it was?

A. No, sir; I do not.

(Witness excused.)

Court here took a recess until 2 p. m. of said day, at which time the following further proceedings herein were had, to wit:

Mrs. LORA HENRE, called as a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct examination by Mr. WATSON:

Q. Do you live in this city?
A. Yes.
Q. Near what place?
A. We live at 17th street and "L" road.
Q. 17th street and "L" *raod*?
A. Or Stewart avenue, one or the other.
Q. Do you know Mr. Otto J. Morasch and his wife?
A. Yes, sir.
Q. Do you know where they live?
A. They live right across Stewart street.
Q. Right across Stewart avenue?
A. Stewart avenue; yes, sir.
Q. Your houses set opposite one another?
A. Almost; yes, sir.
Q. Do you remember the occurrence of the death of Irene Morasch there in June last?
A. Yes, sir.
Q. Did you see the train by which this accident was occasioned?
A. Not until after it stopped.
Q. Did you then go to the place where the child was dead?
A. Yes, sir.
Q. What attracted your attention to the train?
A. When the brakes was applied I heard the noise, but I couldn't see the train for the embankment.
Q. Did you hear the bell upon the engine ring?
A. No, sir; I never noticed it.
Q. Did you hear the whistle upon the engine sound?
A. No, sir.
Q. How long have you lived in the vicinity of this place where the child was killed?
A. We lived there a year last September.
Q. Do you know where this railroad track is?
A. Yes, sir.
Q. Have you ever had occasion to go upon the railroad track and see how far east you could look from the point where the accident happened?
A. Yes, sir.
Q. I wish you would tell the jury how far east you can see from a point where the child was killed, standing upon the track of the railroad company.
A. I could see about 150 or 200 yards east.
Q. To what street, if any?
A. To 16th street; below 16th street to the cattle-guard.
Q. Below the cattle-guard at 16th street?
A. The cattle-guard is below 16th street. I could see the track to the cattle-guard.
Q. Did you notice how the child was dressed that lay there dead?

A. Yes, sir.

Q. Just tell the jury the color of the child's clothing, as nearly as you can.

A. It had on a little light calico dress and a red-flannel skirt.

Q. Do you remember the color of the calico dress?

A. Well, it was a little faded dress; I don't know just the color.

Q. You did not look at that closely?

A. No, sir; I did not.

36 Cross-examination by Mr. WAGGENER:

Q. How far do you live from the place of this accident?

A. Well, I don't know as to the distance we lived. Oh, it wasn't very far. It ain't as far as I could see down the railroad—probably half of that distance.

Q. How many yards?

A. I would say 75 yards.

Q. Were you at your house at that time?

A. I wasn't right at the door; I was between the house and 16th street.

Q. You were on the outside?

A. Yes, sir.

Q. You say the first thing that attracted your attention was the application of the brakes?

A. Yes, sir.

Q. What kind of a noise did it make?

A. Seemed to make a kind of chugging noise, as it is stopped sudden.

Q. You could hear that distinctly?

A. Yes; I heard that. That is the first thing that attracted my attention.

Q. So you was attracted to this train by reason of the fact of the application of the brakes and sudden stopping of the train?

A. Yes, sir.

Q. Had you seen the train before that?

A. No, sir.

Q. Had you heard it coming?

A. No; I didn't pay any attention to it, the trains pass so often.

Q. Pass there every hour or two; you do not pay any attention?

A. I didn't pay any attention.

Q. You might have heard it if you had listened to it?

A. I suppose I could; I was outdoors.

Q. What distance could you ordinarily hear a train when you are listening for it?

A. I can hear the train directly after it leaves the depot; I can hear it whistle.

Q. Suppose it don't whistle; just the noise of the running and exhaust of ste-m?

A. Well, I can hear that about—well, Tenth street, I guess, if I am listening.

Q. This place where the child was struck there is grown up with weeds, is it?

A. It was; yes, sir.
Q. At that time?
A. Yes, sir.
Q. It was an unfrequented place; it was not a place that was used for people at all?
A. No; I guess not; I had no occasion to cross there myself.
Q. How far was that from any street crossing?
A. Well, it is between 17th and 18th street; it is northeast.
Q. It was not near any public street crossing?
A. No, sir; the nearest street crossing is 16th street.
Q. Right up at the point where the child was struck, you say the weeds had grown up quite high?
A. They was grown up pretty well, but they was not right up to the track.
Q. How near to the track?
A. Perhaps as far as from here to that table.
Q. Three or four feet?
A. Yes, sir.
Q. Close to the track they had been cut down, had they?
A. Yes.
Q. But on that side where the weeds were growing they were some three or four feet high?
A. Yes, sir.
Q. So a child in those weeds could not be seen at all?
A. No; I guess not.

(Witness excused.)

37 GEORGE A. ATKINSON, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WATSON:

Q. State your name to the jury.
A. George Atkinson.
Q. Where do you live?
A. Between 6th and Dugarro avenue.
Q. Were you living, during June, 1893, near 17th street and the Wyandotte and Northwestern Railway Company?
A. Yes, sir.
Q. Whereabouts in that vicinity?
A. 1727 Stewart avenue.
Q. Do you remember the accident that befell Irene Morasch, Mr. Morasch's little girl, on the 16th of June?
A. Yes, sir.
Q. Tell the jury where you were, with reference to this spot that the accident occurred on, at the time of the accident.
A. Well, I was at home.
Q. In doors or out?
A. I was in the house at the time.
Q. How was you attention attracted to this accident?
A. By the reversing engine; I heard the sound of reversing the engine.

Q. Were the doors open?

A. Yes, sir.

Q. How far is your house from the railroad track, or from where this accident occurred?

A. About 125 yards, I suppose.

Q. Did you go over to the railroad track immediately?

A. Yes, sir.

Q. See the little girl lying there dead?

A. Yes, sir.

Q. Prior to this sounding of the air brake, did you hear any bell ringing on the engine?

A. Oh, I don't remember; it might have rang, because it is such a common occurrence; I never paid any attention to it.

Q. Did you hear the whistle sounding at all?

A. Oh, I might have heard it, but not paying any attention to it.

Q. You don't now recollect that you did hear either a whistle or a bell?

A. No; I do not remember.

Q. How long had you lived, prior to the time of the accident, where you were then living?

A. About four years, I believe; pretty close to that.

Q. Was the place of the accident directly north of your house?

A. No, sir; it was northeast.

Q. North and east?

A. Yes, sir.

Q. Where was the place of the accident, up on a little fill?

A. Yes, sir; it was rather between two cuts there.

Q. About how high was the embankment upon which the railroad was constructed?

A. Why, I suppose from the general level it run up maybe a couple of feet; run up gradual.

Q. Have you ever traveled back and further along the railroad right of way between the rails from the point of the accident eastward?

A. No; not right on the railroad track.

Q. Have you ever looked along the railroad track from the point of accident eastward so as to be able to tell how far one standing where the accident occurred could see eastward?

A. Oh, I looked up and down the track there, I suppose, several times.

Q. Can you tell the jury about how far one can see eastward from the point of the accident?

A. Well, not exactly; I think, though, two or three hundred feet; maybe further; at least that far.

By a JUROR: I did not understand the meaning of that answer.

By the COURT: What was your answer to that question?

A. I said two or three hundred feet.

38 By Mr. WAGGENER: "At least that far."

The WITNESS: At least that far.

Q. Were there any folks there when you arrived at the railroad where the child was laying dead?

A. Why, there was several there—that is, got there about the time I did; some of them off of the train.

Q. Did you see the train immediately after it stopped?

A. I saw it just before it stopped.

Q. Did you see where it stopped?

A. Yes, sir.

Q. How far past the point where the child was upon the track did the train run before it stopped?

A. Why, I suppose somewhere from maybe 15 or 20 feet; I didn't notice particularly.

Q. Was that distance between the child and the rear of the train?

A. Yes; I think it was something like that.

Q. Is there any pathway in the vicinity of the place where the child was killed?

A. Yes, sir.

Q. About how wide is the pathway?

A. Oh, it is just a common path. People going from the "L" road station out north there, they would go from there onto the Northwestern.

Q. Does it run onto the track or does it cross over—I mean does it lead up onto the track and then along the track or does it cross over the railroad?

A. It leads up onto the track; then people generally went up on the track.

Q. What people, living out in that vicinity or beyond?

A. A great many of them lived along in there; the Quindaro people, a great many of them lived northwest there and come from the "L" Road station—the London Heights station—they would go — the Northwestern.

Q. Now, above the point of the accident, what is the first street that is opened through?

A. Above?

Q. Yes; west.

A. Eighteenth.

Q. Now, between 18th street—or how far east of 18th street is it to the next street that is opened through and across the track?

A. Nothing closer than 13th.

Cross-examination by Mr. WAGGENER:

Q. What time in the day was this accident?

A. About ten o'clock, I guess.

Q. That is the usual time of that train going west, is it?

A. I suppose so; yes, sir.

Q. The point where this child was injured is the extreme limits of the city out there?

A. Eighteenth, I think, is.

Q. It is farming country just beyond?

A. Yes, sir.

Q. The place of this accident is not at any public crossing at all, it is between?

A. No street crossing.
Q. That is what I mean.
A. No, sir.
Q. It is on the private right of way of the company?
A. Yes.
Q. The track was laid out there, was it not, before the city was at that point?
A. I couldn't say as to that.
Q. You don't know as to that?
A. No, sir.
Q. Did you hear the application of the brakes and the stoppage of the train?
A. Yes, sir.
Q. You could hear that distinctly?
A. Yes, sir.
Q. So far as you know, every effort was made to stop the train as soon as they could?
A. Yes; as far as I know.
Q. Right there at the point where the child was struck there are a number of weeds growing up very thick, are there not?
A. Yes; the weeds were tolerable thick.
Q. About how high were they, two or three feet?
A. Yes; two or three feet.

(Witness excused.)

39 By Mr. WATSON: We desire to amend the petition by striking out that portion which refers to the injuries having occurred at a public crossing at 17th street, and inserting an allegation to conform to the proof in this case.

By Mr. WAGGENER: We object to that. The petition alleges this child was killed at a street crossing by attempting to cross the street, and that proper efforts were not made to give the proper signals. I do not think the gentlemen can amend the petition by setting up a different cause of action entirely. It now appears without any question this accident occurred upon the private grounds of the company, and the child was a trespasser upon these grounds.

By the COURT: I think the amendment is proper and may be made.

And thereupon the plaintiffs duly amended their petition as hereinbefore set forth in this case-made.

And thereupon, by leave of the court, the said defendant was allowed to amend his answer herein by inserting in the sixth paragraph thereof the word "private" before the word track, the words "and authority," and "& in violation of the ordinances of the city."

And thereupon the further hearing of this cause was proceeded with as follows, to wit:

Miss Rosa Klinger, called — a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct examination by Mr. Watson:

Q. State your name.
A. Miss Rosa Klinger.
Q. Where do you reside?
A. 1719 Stewart avenue.
Q. About how far is that from the railroad track of the Wyandotte and Northwestern?

By Mr. Waggener: The defendants objects to any evidence under the petition as amended, because the same does not state any facts sufficient to constitute a cause of action, and shows that the said deceased, at the time of the injury complained of, was a trespasser upon the private right of way of the defendant, without any right or license to use the same.

Objection overruled by the court. Defendant excepts.

A. It is about a hundred yards, I guess.
Q. Upon the morning that Irene Morasch was killed, did you see the train that ran over her?
A. Yes, sir.
Q. Where was it when you first saw it?
A. It had stopped already.
Q. Where were you when you saw the train?
A. The front part of the house.
Q. Out doors or in?
A. Well, I was standing—the door was open—I was sitting in the front room talking to mama.
Q. Can you see the railroad from your front door, where you were?
A. Yes, sir.
Q. Did you see the child upon the track before the engine struck it?
A. Yes, sir.
Q. What did you see the engineer do towards stopping the train?
A. Well, I didn't take no notice until I heard the wheels reversed. I heard the train reversed.
Q. Did you go over where the child was?
A. Yes, sir.
Q. How long have you lived in that vicinity?
A. Two years.
Q. Two years now?
A. Yes, sir.
Q. Did you ever look down the railroad track to see how far you could see from where the child was killed—east?
A. I haven't took particular notice.
Q. You say you did not take particular notice?
A. No, sir.
Q. Have you ever looked at any object upon the track—down the track east?

A. Well, you can see to 16th street.
Q. You can see to 16th street?
A. Yes, sir.
Q. From the place where the child lay?
A. Yes, sir.
Q. Do you know about how far that is?
A. No, sir.
Q. It is the distance from 16th street to 17th street, and then from 17th street up to where the child lay, is it not?
A. Yes.

Cross-examination by Mr. WAGGENER:

Q. You saw the train as it came up?
A. Well, no; I didn't; I heard it coming.
Q. Do you know about the spot where the child was struck?
A. No, sir; I do not.
Q. Did you see them reverse the engine before they reached the child?
A. No; I couldn't see.
Q. You testified, did you not, before the coroner's jury?
A. Yes.
Q. Before the coroner's jury was not this question asked you, and didn't you answer, "Did you see it strike a little three-year-old girl out there"? "Answer." "No, sir; I did not see them strike her, but saw them reverse the engine before they did strike."
A. No, sir; I said I seen the- reverse the engine. I don't know what they struck.
Q. What made you think they reversed the engine?
A. Well, I just seen it; that is all.
Q. Did you see the engineer pull back the lever?
A. Yes, sir.
Q. Well, about how far was he from the spot where the child was struck when you saw him do that?
A. I couldn't say.
Q. Was the train running very fast?
A. No, sir.
Q. What is that?
A. I didn't think she was.
Q. And the bell ringing?
A. Yes, sir.
Q. All the way coming up?
A. Yes, sir.
Q. And you saw the engineer pull back the lever and heard the train stop?
A. Yes, sir.
Q. At that time you don't know just where the child was?
A. No.
Q. Did you go over there afterwards?
A. Yes, sir.
Q. And saw about where the child was struck?
A. Yes, sir.

Q. Now, how far east of the place where the child was struck did you think it was where you saw the engineer reverse the engine?

A. I couldn't say.

Q. A hundred feet, about?

A. I don't know; I couldn't say.

Q. How far could that child have been seen in the weeds there by a person on an engine?

A. I couldn't say, either.

Q. Pretty high weeds there, were they not?

A. Yes, sir.

Q. You say the bell was ringing continuously as the train came up?

A. I heard it ring.

Q. And the first thing that attracted your attention specially was you saw the engineer reverse his engine and heard the application of the brakes?

A. Yes, sir.

Q. And the train came to a stop just as soon thereafter as it could, you suppose?

A. Yes, sir.

Q. Did you see the fireman at the same time?

A. No; I didn't notice.

Q. Then, so far as you know, everything was done that could be done to stop the train as soon as the child was seen?

A. Yes, sir.

(Witness excused.)

41 Mrs. ELIZA MORASCH, recalled as a witness on behalf of the plaintiff, testified as follows:

Further direct examination by Mr. WATSON:

Q. You are the Mrs. Morasch that was on the stand this morning, are you?

A. Yes, sir.

Q. On the day that your little child was killed—I wish you would tell the jury the color of the dress that she wore. Describe it.

A. It was a light green.

Q. Any trimmings on it?

A. Yes, sir; red.

Q. Trimmed how—with red?

A. Trimmed around the skirt and——

Q. Around the skirt at the bottom of the dress, and then any over the shoulders?

A. Yes, sir.

Q. Had red stripes or what?

A. Turkey red, gathered on the shoulders.

Q. Right upon the shoulders?

A. Yes, sir.

Q. Do you know about the distance between the 16th and what would be 17th street if it had been opened up?

A. No, sir; I don't.

Q. Well, about—you know where the corner of 6th street and Minnesota avenue is here, do you?

A. Yes, sir.

Q. Is it as far from where the child was killed to 16th street as it is from here down to the corner of 6th street and Minnesota avenue, where the Husted building is?

A. I don't know. I believe it——

Q. Now, can you give the jury any idea about the distance from here down to 6th street on Minnesota avenue?

A. No, sir; I can't.

Q. You can't tell them about how many yards it is?

A. No, sir; I couldn't tell.

Cross-examination by Mr. WAGGENER:

Q. You say this child had on a green dress?

A. Yes, sir; light green.

Q. About the color of the weeds that were growing there?

A. No, sir; it was lighter.

Q. A litt'e lighter than that?

A. Yes, sir.

Q. Have any bonnet or hat?

A. No, sir; she was bareheaded.

Redirect examination:

Q. I believe you said you were sick that day?

—. ——.

Recross-examination:

Q. But you were up and around and ironing that day?

A. Yes, sir.

(Witness excused.)

By Mr. WATSON: We now desire to offer in evidence ordinance No. 522 of the city of Kansas City, Kansas, the same being found upon page 274 of the published ordinances of this city.

By Mr. WAGGENER: That is objected to by defendant, because the said ordinance is not plead in the petition, because it is incompetent, irrelevant, and immaterial, and because the said ordinance is void upon its face and not germane to any issue made by the pleadings.

By the COURT: I think the pleading is sufficient as against a general objection of this kind, but in reference to the other objection, unless it is shown by the proof that the railroad referred to in this ordinance is of a different kind and character than this, the ordinance must be held void.

To which ruling of the court the defendant excepts.

42 W. S. CARROLL, called as a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct examination by Mr. WATSON:

Q. What is your name?
A. W. S. Carroll.
Q. How long have you lived in Wyandotte county, Kansas?
A. Since 1876, I believe.
Q. What is your profession?
A. I am attorney-at-law.
Q. Were you ever the attorney in the city of Kansas City, Kansas?
A. Yes, sir.
Q. During what year?
A. 1886, 1887, and 1888, if I recollect aright.
Q. Do you know where 17th street intersects the Kansas City, Wyandotte and Northwestern railroad?
A. I may have known it, but I can't think of the location right now.
Q. Do you know where 18th street crosses that railroad?
A. Yes; I know where about 18th street crosses.
Q. Do you know where the western city limits of Kansas City, Kansas, are?
A. It is supposed to be——
By Mr. WAGGENER: Answer whether you know it or not.
The WITNESS: Possibly I do, from recollection.
Q. Now, I wish you would tell the jury if a point upon the Kansas City, Wyandotte and Northwestern railroad east of 18th street is and on the 16th day of June, 1893, was within the city limits of Kansas City, Kansas.

Objected to by defendant, because no proper foundation has been laid for the question, because it calls for secondary evidence of the fact sought to be proven, and calls for the opinion of the witness, and as incompetent, irrelevant, and immaterial. Objection overruled by the court. Defendant excepts.

A. I think, on general principles, that that point would be within the limits of the city.

Defendant move- to strike out the answer of witness as being a mere opinion and conclusion and as not responsive. Motion sustained by the court.

Q. Do you know, as a matter of fact, where the western city limits of this city are?

Objected to by defendant as leading and as incompetent, irrelevant, and immaterial. Objection overruled. Defendants excepts.

A. Yes; I know.
Q. Is the western city limits of Kansas City, Kansas, beyond 18th street?

Objected to by defendant as calling for the opinion of the witness

and as incompetent, irrelevant, and immaterial. Objection overruled. Defendants excepts.

A. It is not; it is on 18th street.

Q. Now, is a point east of 18th street, in this city, within or without the city limits of Kansas City, Kansas?

Objected to by defendant as calling for the opinion of the witness and as not the best evidence and incompetent, irrelevant, and immaterial. Objection overruled. Defendant excepts.

A. State that again, if you please.

Q. (Last question read by stenographer.)

A. A point east of 18th street would be within the city limits—that is——

By Mr. WAGGENER: Wouldn't it depend upon how far north it was?

The WITNESS: It would depend. I was going to make that qualification.

43 Q. You know where Stewart avenue is, in this city?

A. Yes, sir.

Q. We will say within two blocks of Stewart avenue and east of 18th street?

A. I think that would be within the corporate limits.

Q. Now, do you think or do you know?

A. That is my judgment on it.

Q. You know where the northern city limits go, don't you?

A. No- exactly. I only have a general idea of the general boundary. The western boundary I know because I lived in Chelsea park until only recently. I know where the limits are there and all along that line.

Q. You know where the Kansas City, Wyandotte and Northwestern railroad runs?

A. Yes, sir.

Q. Until it gets beyond 18th street?

A. Yes, sir; I know that location.

Q. Now, is there any point upon that railroad east of 18th street that is not in the corporate limits of Kansas City, Kansas?

Objected to by defendant as leading, as incompetent, irrelevant, immaterial, and calling for the opinion of the witness, and secondary evidence. Objection overruled. Defendant excepts.

A. There is not.

Q. How long have you know- of the operation of what has always been publicly known as the Elevated railroad, formerly the Interstate Rapid Transit Railway Company?

A. Since its operation in the city? I would have to study to find out when it was started first. I have known it since it was originally operated on the city.

Q. Well, how many years has that been?

A. Seven or eight years, I should judge.

Q. Have you seen it in operation daily?

A. Almost.

Q. Tell the jury what kind of traffic it does.

A. It has an ordinary street railway track.

Q. Have you ever seen it carrying any freight of any kind or character?

A. No; it is not a railroad of that character.

Q. What is its general business?

Objected to by defendant as incompetent, irrelevant, and immaterial and not within the issues in the case. Objection overruled by the court. Defendant excepts.

A. Its general business is that of a traffic railroad—street railway—for the conduct or carriage of passengers only from point to point within the corporate limits, and sometimes without, as it lies without.

Q. Where it runs without the corporate limits of the city, where does it go?

A. This road runs to Kansas City, Missouri.

Cross-examination by Mr. WAGGENER:

Q. What kind of motive power was used by this company in June, 1888, and since that?

A. Steam motive power, if I recollect rightly.

Q. How many cars did they generally run?

A. Two cars attached together.

Q. Passenger cars?

A. Passenger cars; yes, sir.

Q. How were they in size, as compared with the ordinary coaches on the passenger trains?

A. You mean on regular railroad trains?

Q. Yes.

A. They were small, compared with those.

Q. About one-third smaller?

A. Well, at a guess, they would be; perhaps it would be more than that, because I could not say; my attention was never attracted to that.

Q. Do you know about what was the capacity of the engines hauling those cars for speed?

A. I do not.

Q. I will ask you if the capacity of those engines for
44 speed is not nearly equal to that of the ordinary locomotive, so far as your observation has given you information on the subject.

A. I couldn't tell. I never noticed it; never thought about it.

Q. They are very large engines, are they not?

A. No. They are small; dummy engines they are called; of small capacity compared with the engine attached to the ordinary railway cars.

Q. Are you familiar with the capacity of the ordinary engine on the ordinary cars?

A. No, sir; I am not.

Q. Then you have no information that would enable you to make a comparison between the two as to their capacity?

A. I could not; it would be a mere guess.

Q. Now, you say that track is an ordinary street railway track?

A. Yes, sir.

Q. Is it not a fact that the track of this railroad is constructed of a "T" rail of as heavy weight as is used generally on any of these railroads?

A. It so appears, I believe. I do not think it is quite as heavy from looking at it.

Q. Isn't it the same character of a "T" rail in weight and appearance as that used by the Kansas City, Wyandotte and Northwestern going through the city?

A. I think it is of the same character.

Q. Now, in speaking about this point to which your attention has been called as being within the city limits, is that within the city proper or in an addition to the city?

A. There was an extension of the city limits, and of course after an extension is made it is all within the city proper.

Q. But this is not a portion of the city as originally laid out and platted?

A. No; it is not.

Q. Do you know anything about when this piece of land referred to was brought into the city limits as a matter of fact?

A. I was attorney then, but I have forgotten the time it was brought in, but I know I was attorney when the limits were extended.

Q. What is the character of the population—I mean as to numbers—in that vicinity up there?

A. It is limited as compared with other sections of the country.

Q. Isn't that a very thinly populated portion of this city up in the northwestern part of it?

A. I think it is.

Q. That is what you might call the extreme limits of the city, is it not?

A. Yes; the extreme western limits.

Q. What is the distance in miles from that point to this courthouse?

A. I could not hardly tell; it would be guessing.

Q. Give your best judgment.

A. From here to what point on 18th street—the Northwestern railroad?

Q. The point on 18th street where it is intersected by the Northwestern road.

A. Three-fourths of a mile. It may be a mile.

Q. Now, the land immediately west of 18th street is agricultural land, is it not?

A. It is.

Q. Farms?

A. Yes.

Q. And the land north of this spot is agricultural land?

A. Yes, sir.

Q. This spot to which your attention has been called, it is the extreme northwestern limits—of what you understand are the city limits of Kansas City, Kansas?

A. It is not the extreme northwestern limits, but bordering on it.

Q. The extreme western limit is that point?

A. The extreme western limit is that point.

Q. It would be within 300 to 500 feet of the extreme western limit of this city?

A. It might be.

45 Q. Assuming that 18th street is the western limit.

A. I remember distinctly that 18th street is the western limit.

Redirect examination by Mr. WATSON:

Q. Do you know what motive power was used in the operation of this Interstate Rapid Transit railway during last June?

A. I think I do.

Q. You may state to the jury what it was.

Objected to by defendant as incompetent, irrelevant, and immaterial, and being a date after the passage of the ordinance sought to be introduced in evidence.

A. You mean the elevated?

Q. Yes.

A. It was electric motive power.

(Witness excused.)

W. H. H. FREEMAN, called as a witness on behalf of the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. WATSON:

Q. You may state your name.

A. W. H. H. Freeman.

Q. How long have you lived in this city?

A. About six years.

Q. What is your profession?

A. Attorney-at-law.

Q. Do you know what is publicly called the elevated road, formerly used to be the Interstate Rapid Transit Railway Company?

A. Yes, sir.

Q. You have seen it in operation?

A. Yes, sir.

Q. Almost daily during your residence in this city?

A. Yes, sir; I can say daily.

Q. What kind of traffic has it been engaged in ever since you have known it?

A. Carrying passengers.

Q. Did you ever see it carrying any freight?

A. I think not.

Q. Carrying passengers where?
A. Different parts of the city.
Q. Do you know what the uniform fare upon that railroad has been?
A. I think so.
Q. You may state to the jury.

Objected to by defendant as incompetent, irrelevant, and immaterial. Objection overruled. Defendant excepts.

A. A nickel.

By the COURT: This testimony is for the court and not for the jury.
By Mr. WAGGENER: I understand that.

Q. Ever since you have lived in this city—do you know what the motive power used upon this elevated railroad had been during the month of June, 1893?
A. June, 1893?
Q. Yes; this year.
A. Electricity, I think.
Q. Well, do you know?
A. I ain't quite sure about it—let's see; June, 1893; yes, sir; electricity.

Cross-examination by Mr. WAGGENER:

Q. You have had occasion to observe the operation of this Rapid Transit line very particularly, as to the speed of its cars?
A. No, sir.
Q. Are you able to state what the speed of those cars—what the capacity of that dummy engine was before it was changed to electricity, as far as the speed was concerned, as compared with the capacity of an ordinary locomotive?
A. Yes; I think I can, approximately.
Q. What was the attainable speed of one of these dummy engines—we will say with two cars attached?
A. Oh, I can't say that.
46 Q. Well, is there much more danger from the ordinary locomotive to a person on the track than one of these dummy engines, if they do not get out of the way?
A. No; I think the dummy is as dangerous as the other.
Q. What is that?
A. I think the dummy is fully as dangerous as the other.
Q. How about the road as operated today, with electricity?
A. As compared with the ordinary locomotive engine on the railroad?
Q. I mean as far as danger is concerned to persons on the track?
A. You mean in comparison with other roads or in comparison with the former engine?
Q. In comparison with the former engine.
A. Well, I should judge that the present motors were not as dangerous as those of the dummy engines.

Q. They are dangerous, are they not?
A. They are not so dangerous as a dummy.
Q. They are dangerous?
A. At the present time?
Q. Not so dangerous, but they are dangerous?
A. Why, certainly; accidents are happening on the streets every week.
Q. Because of the speed of these trains?
A. I don't know as to that.

Redirect examination:

Q. There is danger in a cable car passing the court-house, isn't there? They are dangerous machines, are they not, to human life—to persons upon the street?
A. Yes; I should call them so.

Recross-examination:

Q. How far does this dummy line, so called, run out of the city limits west?
A. Beyond the city limits west?
Q. Yes.
A. Why, it branches out here; one part goes to Edgerton and the other goes to Chelsea park.
Q. How far out is that?
A. Chelsea park?
Q. Yes.
A. I think it is a little beyond—I don't know whether it is beyond 18th street or not.
Q. How far from the court house here?
A. Around by the track?
Q. Yes.
A. I should judge two miles.
Q. What is the length of this Interstate Rapid Transit line?
A. Why, it starts at 8 street, over in Kansas city.
Q. Missouri?
A. The corner of 8th and Delaware, in Kansas City, Missouri, and runs past here, on 6th street, out to Chelsea park and out to Edgerton.
Q. About how many miles would you say that was?
A. I should guess it was pretty near three miles, or about three miles.
Q. Then does it run around the city?
A. Around and through. I don't mean it runs around by outside.
Q. No; I mean up around this way, northwest.
A. Yes.

Redirect examination:

Q. How far is Chelsea park from the court-house, take an air line?

A. I don't know.

Q. Is it more than three-quarters of a mile?

A. I should say it was a mile or about a mile.

Q. Now, you say you think those dummies were about as dangerous as the ordinary railroad locomotive; you mean if they could run as fast?

A. No; I don't. They did not make as much noise; they crept up onto you quicker and more accidents happened by them.

Q. You did not mean that they could run as fast as an ordinary locomotive?

A. No.

Q. They were enclosed—little engines?

A. Yes, sir.

(Witness excused.)

47 Plaintiffs here now offered in evidence said ordinance number 522 of the city of Kansas City, Kansas, heretofore referred to.

Defendant objects to the introduction of said ordinance as incompetent, irrelevant, immaterial, and not properly set up in the petition, and because the said ordinance is void upon its face, for the reason that it excepts the Interstate Rapid Transit Railway Company from the operation thereof, and because said ordinance only fixes a penalty upon the engineer who should violate it, and fixes no penalty upon the railroad company using or operating the engine; because no foundation has been laid for the introduction of the same, and because said ordinance should be held invalid as to that portion of the city where the accident occurred, as it would be a restraint upon trade and commerce to enforce the same in accordance with the provisions thereof.

Objection overruled by the court. Defendant excepts.

Said ordinance No. 522 of Kansas City, Kansas, was here read in evidence on behalf of the plaintiffs herein, the same being in words and figures following, to wit:

*Ordinance No. 522.*

(First published September 26, 1888.)

"An ordinance to regulate the running of locomotives and cars in the city of Kansas City."

Be it ordained by the mayor and councilmen of the city of Kansas City.

(Shall ring bell.)

SEC. 1. It shall be the duty of every engineer or other person engaged in running a locomotive to ring the bell attached to such locomotive, whenever the same shall be moving through the city.

(Six miles per hour.)

SEC. 2. It shall be unlawful for any such engineer, conductor or other persons having a railway engine or train of cars in charge to permit same to be run along any track in said city at a greater speed then six miles an hour.

(Funerals.)

SEC. 3. It shall be unlawful for any locomotive to be run within this city in such a manner as to hinder or interfere with any funeral procession.

(Sounding of whistle, when.)

SEC. 4. It shall be unlawful for any person running or controlling any locomotive to sound the whistle thereof or allow the same to be sounded within the corporate limits of this city except to prevent accidents that cannot otherwise be arrested and to start and stop the train.

(Escaping steam.)

SEC. 5. It shall be unlawful for any person running or controlling any locomotive to allow steam to escape from the cylinder cocks.

(Running "backwards.")

SEC. 6. It shall be unlawful for any engineer, conductor, or other person managing or controlling any locomotive or train of cars — run the same backwards or cause to be so run in or
48 through said city, without providing for a watchman or other person on rear end of such train in order to avoid accidents.

(Penalty.)

SEC. 7. Any person violating any of the foregoing sections or the provisions of any of them therein contained upon conviction before the police judge shall be fined the sum not exceeding one hundred dollars.

(Exception.)

SEC. 8. The provisions of this ordinance shall not apply to the Interstate Rapid Transit Railway Company, excepting with reference to funeral or other processions.

SEC. 9. This ordinance shall take effect and be in force from and after its publication in the Kansas Pioneer.

Passed in council September 26, 1888.

J. F. MOFFITT, *City Clerk.*

Approved September 27, 1888.

THOMAS F. HANNON, *Mayor.*

Plaintiffs here rested their case.

And thereupon, at the conclusion of the evidence for the plaintiffs herein, came the said defendant and filed with the clerk of said court his demurrer to such evidence, a copy of which demurrer, omitting the caption thereof, being as follows, to wit:

"Now comes the defendant and demurs to the evidence of the plaintiff- introduced herein, because the same does not prove facts sufficient to constitute a cause of action against this defendant.

B. P. & W. P. WAGGENER,
*Attorneys for Def't.*

(Indorsed:) No. 10080. Otto J. Morasch *et al. vs.* Newman Erb, rec., &c. Demurrer. Filed Dec. 18, 1893. E. W. Towner, clerk, by W. H. Towner, deputy.

And thereupon, after argument by counsel, said demurrer was by the court overruled; to which ruling of the court defendant duly excepted and excepts.

And thereupon the said defendant, to maintain the issues on his part, offered and introduced the following evidence:

Defendant first offered in evidence ordinance No. 54 of the city of Kansas City, on page 277 of the published ordinances of said city.

Objected to by plaintiff. Objection overruled.

Said ordinance was here read in evidence, the same being in words and figures following, to wit:

(Official.)

*Ordinance No. 54.*

(First published October 13, 1896.)

49 An ordinance for the prevention of accidents and prohibiting persons from trespassing on railway cars and to prevent accidents thereon.

Be it ordained by the mayor and councilmen of the city of Kansas City:

(Not to climb upon, when.)

SECTION 1. That it shall be unlawful for any person of whatever age, not a passenger, to climb or hang upon or attempt to steal a ride on any car or engine used for the transportation of persons or freight through said city during the time such car or engine is in transit through said city, or to place obstacles on the track or otherwise obstruct the passage of trains.

(Duty of police.)

SEC. 2. It shall be the duty of every police officer of said city to apprehend and prefer charges of misdemeanor against every person he shall find so offending.

SEC. 3. Every person who shall violate the first section of this ordinance shall be adjudged guilty of a misdemeanor and on conviction thereof shall be fined not less than one dollar ($1.00) nor more than ten dollars ($10.00) for each and every offense, together with costs of suit. (Penalty.)

SEC. 4. This ordinance shall take effect and be in force from and after its passage, approval and publication in the Kansas Pioneer.

Passed in council October 11, 1896.

J. MOFFITT, *City Clerk.*

Approved October 12, 1896.

THOS. F. HANNAN, *Mayor.*

JOHN W. COOKSON, called as a witness on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. WAGGENER:

Q. Where do you reside?
A. Leavenworth.
Q. What is your business?
A. Fireman.
Q. What business were you engaged in on June 16th, 1893?
A. Fireman.
Q. What company?
A. The Kansas City, Wyandotte and Northwestern.
Q. Do you remember the circumstance of the accident to this child that was killed out here near the city limits?
A. Yes, sir.
Q. Were you on that engine?
A. Yes.
Q. What was the number of that engine?
A. Thirteen.
Q. What kind of train was it, passenger or freight?
A. Passenger.
Q. Going in which direction?
A. Going west.
Q. What time in the day?
A. Somewhere near ten o'clock.
Q. Was the train on time?
A. Yes, sir.
50 Q. Now, state to the jury about how fast you were running after you passed over 13th street.
A. About between 11 and 12 miles an hour, to the best of my judgment.
Q. Do you remember the circumstance of seeing this child on the track?
A. Yes, sir.
Q. What was the condition of the track as to weeds at that point?

A. Well, there was weeds there, I think, about two and — half or three feet high.

Q. How near to the track?

A. About five feet; four or five.

Q. Which side of the engine was your place?

A. The left side.

Q. Were you in your proper place?

A. Yes.

Q. What were you doing?

A. Ringing the bell.

Q. How long had you been ringing the bell?

A. Since I had left the 5th Street depot.

Q. In what direction were you looking?

A. I was looking west.

Q. The way the engine was moving?

A. Yes.

Q. Looking ahead in the direction the engine was moving?

A. Yes.

Q. State whether you continued to look ahead after your train passed over the 13th street near or on that track.

A. Yes, sir.

Q. How far was the engine from the child when you first discovered it?

A. About forty feet.

Q. At that time how fast were you running?

A. We were running between 11 and 12 miles an hour at that time.

Q. In what direction was the engineer looking at that time, if you know?

A. Well, I don't know.

Q. You were looking ahead?

A. Yes, sir.

Q. Where was the child when you first saw it?

A. It was just stepping up onto the track.

Q. What was done at that time, if anything, to prevent that accident?

A. The brakes was applied and the engine reversed.

Q. State what else could have been done that was not done to prevent that collision.

Objected to by plaintiff as incompetent, irrelevant, and calling for a conclusion.

Objection sustained by the court. Defendant excepts.

Q. How long have you been in the railroad business?

A. Three years; a little over.

Q. In what capacity?

A. Fireman.

Q. As such have you become familiar with the operation of an engine and the appliances on it for stopping it?

A. Yes, sir.

Q. I will ask you if that engine at that time was equipped with

the usual and ordinary appliances used on engines for stopping trains.

A. Yes, sir.

Q. State what other thing, if you know, could have been done at that time which was not done to stop that engine.

A. Not anything that I know of.

Q. How far did the engine run after you saw the child before it was stopped?

A. About a hundred and thirty feet.

Q. Do you know in what distance that train could be stopped with the use of the appliances at hand at that time?

A. About one hundred and fifty feet, I should judge.

Q. Was the train stopped as soon as it could be stopped after the child was discovered?

A. Yes, sir.

Q. This was on the private grounds of the company there, was it?

A. Yes, sir.

Q. I will ask you if there was many public crossings there.

A. No.

51 Q. Upon whose grounds did this accident happen, if you know?

A. The railroad company's.

Cross-examination by GEO. B. WATSON, Esq.:

—. How fast do you say that train was going when it struck the child or when you first saw it?

A. Between 11 and 12 miles an hour, to the best of my knowledge.

Q. I will ask you if you did not testify at the coroner's inquest.

A. I did; yes.

Q. Your name is John W. Cookson?

A. Yes, sir.

Q. I will ask you if this question was not asked you by a juror at that inquest, "How fast was you running."

A. I think it was; yes, sir.

Q. I will ask you if you did not make this answer to it, "About fifteen miles an hour, to the best of my knowledge?"

A. I don't remember just what answer I made to it.

Q. Well, you were going about 15 miles an hour, as a matter of fact, weren't you?

A. Well, I don't know as we were.

Q. Well, the speed at which you were going at that time you remembered about distinctly at the time of the coroner's inquest, didn't you?

A. Why, I remembered about the speed we were going; yes.

Q. I will hand you this paper which purports to be a record of your testimony at the inquest and ask you to look it over and then tell the jury what your recollection is about having made the answer to which I called your attention (handing witness paper).

A. I made the answer here. About 15 miles an hour, to the best of my knowledge.

By Mr. WAGGENER: That is, if that record is right?

The WITNESS: If that record is correct.

Q. What is your recollection now about having made that answer that appears there?

A. I couldn't say to that, because I don't remember it.

Q. You might have been going about 15 miles an hour then, mightn't you?

A. We might have been; yes, sir.

Q. What do you think about it?

A. I don't think we were.

Q. Now, how far ahead did you say the child was when you first saw her?

A. About forty feet.

Q. About how many rail-lengths, do you think?

A. Well, I don't think it was quite one; might have been, possibly, a little more than one.

Q. Did you see the baby first, or did the engineer?

A. I couldn't say for certain, but I think the engineer seen it first.

Q. The first that attracted your attention to it was the engineer says, "There's a little baby." Isn't that it?

A. I didn't hear any such remark made.

Q. You did not hear any such remark made?

A. No, sir; I didn't.

Q. Why, I will ask you if at the coroner's inquest this question was not asked you by the coroner, "Tell the jury what you know about it," and if this was not the answer that you made at that time, "As I was going out on number five yesterday morning—don't know just what time; near 10 o'clock—out there, I think, between 17th and 18th, we was going around a curve there, and I looked ahead and I see something just step out of the weeds; couldn't tell just at the time what it was; stepped right in
52 the middle of the track. The engineer says, 'There's a little baby;' put on the air; reversed the engine as soon as he could. I suppose it was between—I should judge about forty feet when he first spoke." Didn't you make that answer before the coroner's inquest?

A. I suppose I did.

Q. Were you and the engineer talking that morning?

A. Not at that time; no, sir.

Q. Had you been a little while before?

A. Well, that I couldn't say, as I don't recollect whether we had or not.

Q. Do you recollect of talking with him at all between the time you left the Wyandotte and Northwestern depot and the time of this accident?

A. Not from the time we left the depot; no, sir; I don't recollect of.

(Witness excused.)

FRANK E. BUGH, called as a witness on behalf of the defendant and being duly sworn, testified as follows:

Direct examination by Mr. WAGGENER:

Q. Where do you live?
A. I live in Kansas City, Missouri.
Q. Were you in the employ of this company on the 16th of June last?
A. Yes, sir.
Q. In what capacity?
A. Brakeman.
Q. On what train?
A. On passenger train.
Q. Were you on this train that caused this accident on that morning out there?
A. Yes, sir.
Q. About what time did you leave the depot?
A. I left there on time.
Q. Were you on time as you went west there?
A. Yes, sir.
Q. Do you remember the circumstances of the injury to the child?
A. Well, yes.
Q. What attracted your attention first?
A. I was standing in the baggage car; all at once the brake was applied and I went over against the door; bumped my head against the side, and I looked out the door.
Q. What made you go over against the door?
A. Why, putting on the air, and engine reversed.
Q. Did that bring that train to a stop?
A. It did that morning; yes, sir.
Q. About how fast were you running just before these brakes were applied?
A. About 12 miles or 13 miles an hour, I judge.
Q. You were in the baggage car?
A. Yes, sir.
Q. In your proper place?
A. Yes, sir.
Q. The first thing you noticed, then, was the application of the brakes and sudden stoppage of that train?
A. Yes, sir.
Q. In what distance did that train stop as soon as you noticed the first application of the brakes; how many feet did it run?
A. I would judge about 140 or 150 feet.
Q. From the first application of the brakes?
A. There wasn't only one application.
Q. I mean from the time you first discovered it?
A. Yes, sir.
Q. Until it came to a stop, was about 140 feet?
A. Yes, sir; that was what I judge.
Q. What was the condition of the track with reference to the weeds there on either side?

A. Why, the weeds was up about two feet and a half, maybe three feet, along the track.

Q. There is no public street or crossing there?

A. No, sir.

53 Q. What kind of ground was there on either side—embankments?

A. Why, it is right between two cuts.

Q. That is where the accident happened?

A. Yes, sir.

Q. I will ask you if the bell was ringing..

A. Yes, sir.

Q. From what point?

A. Well, the time we left the 5th Street depot.

Q. Any whistle blown?

A. Yes, sir.

Q. Where?

A. Thirteenth street.

Cross examination:

Q. Are you in the employ of the company now?

A. Well, no.

Q. You are over in the company's hospital, are you not?

A. Yes.

Q. Received an injury on this railroad?

A. I don't know whether that has got anything to do with this case.

By Mr. WAGGENER: What is the question?

The WITNESS: What is the question?

Q. (Last question read by the stenographer.)

A. No, sir; I did not.

(Witness excused.)

THOMAS HENSHALL, called as a witness on behalf of the defendant and being duly sworn, testified as follows:

Direct examination by Mr. WAGGENER:

Q. Where do you live?

A. Kansas City, Kansas.

Q. What business are you engaged in?

A. Life insurance.

Q. How long have you been engaged in that business?

A. Three years.

Q. Have you in your possession the ordinary mortality tables used by life-insurance companies?

A. Yes, sir.

Q. What is the youngest period at which mortality tables are prepared, so far as you know?

A. Ten years is the lowest.

Q. Do you know why mortality tables are not prepared for persons younger than ten?

A. It is because it has been considered by medical experts that about one-fourth of the human race die——

By Mr. WATSON: We object to that as hearsay and incompetent, irrelevant, and immaterial.

Objection overruled.

The WITNESS (continuing): About one-fourth to a third; one-fourth, anyway, of the human race die—that is, from birth up to the age of ten.

Q. How old a man are you?

A. I am sixty-two.

Q. You have children?

A. Yes, sir.

Q. Boys and girls?

A. I have three boys and one girl.

Q. Do you know what the ordinary expense of supporting, maintaining, and educating is from, say, three years of age up to 18?

A. No, sir; I don't.

Q. Did you never defray any such expenses?

A. Yes, sir; there is a good deal in girls.

Q. Now, I will ask you if you have a general idea of the cost and expense of supporting, educating, and maintaining girls, say from the age of 3 up to 18 years of age—the expense per annum.

A. No, sir; that is a little more on the expert than I have got.

Q. Well, do you know what the services of a child from 3 years of age, a girl, would be worth, on an average, per annum—the average from 3 to 18?

A. I think it would be very little, from this fact: They are not competent to earn wages until they would be about 14, so that the producing age of a girl would be about four years, by the
54 way our society is organized. In England, where they work children younger, it would be different.

Q. What would be the difference between the relative earnings, generally speaking, of a girl from 3 to 18 years of age and the expense of educating, maintaining, and supporting during that period—in other words, which would be the greater?

A. I think that the balance would be on the debtor side of the ledger.

Q. What do you mean by that? Which would be the greater, the earnings or expenses?

A. The expenses.

Q. So, then, that, in your opinion, from your experience as a man raising a family, it would cost more to educate, maintain, and support a child from three to 18 years of age than she could possibly earn?

Objected to. Question withdrawn.

Cross-examination by Mr. WATSON:

Q. How long have you been in the insurance business?

A. Three years, about.

Q. Where did you get that book?
A. This is a book that all insurance men use.
Q. Where did you get this one?
A. From Topeka?
Q. When was it sent to you?
A. Look in there; you will see the date.
Q. April 1st, 1892. What kind of insurance are you in?
A. Life, "old line."
Q. What companies do you represent?
A. I represent the Kansas Mutual Life of Topeka.
Q. Is that the only company you ever represented?
A. Yes, sir.
Q. You say you have been in their employ about three years?
A. Yes, sir.
Q. You never did any insurance business before that time?
A. No.
Q. What is your profession or trade or occupation?
A. Well, I have been a farmer a good deal—the best part of my life—a Granger. I have been an Alliance man.
Q. Are you an Alliance man now?
A. No, sir; I am a straight Republican.

(Witness excused.)

It is admitted by counsel for the plaintiffs herein that the original condemnation proceedings show that the right of way of the Kansas City, Wyandotte and Northwestern Railway Company was acquired by condemnation proceedings on September 9th, 1886, through the land where this accident is alleged and claimed to have happened, and that subsequent to the acquisition of such right of way by condemnation proceedings, to wit, on the 22nd day of April, 1890, there was laid out what is known as "Carpenter's place" as an addition to the City of Kansas, Kansas; which dedication reads as follows:

"The lands included in the plat are owned and platted by the Carpenter Place Land Company and described as follows, viz:

Commencing at a point 174½ feet north of the southwest corner of the southeast quarter of section 32, town 10 south, thence east to the westerly right-of-way line of the Brigyton Hill and Chelsea Park railroad; thence northeasterly along said right-of-way line to the west line of Felt place; thence north along the last-named line to the southerly right-of-way line of the Kansas City, Wyandotte and Northwestern railroad; thence westwardly along
55 the last-named right-of-way line to the west line of the southeast quarter of the above-named section 32; thence south to the point of beginning; also commencing at a point 925 feet north of the southwest corner of the southeast quarter of the above-mentioned section 32, thence south to the northerly right-of-way line of the Kansas City, Wyandotte and Northwestern railroad; thence westerly along the last-named line to the west line of the southeast quarter of the above-named section 32; thence north to the point of beginning.

The street and alleys, as shown on said plat, are dedicated to and for the public use forever."

Said dedication being dated the 22nd day of April, 1890, and is signed by the president of the Carpenter Place Land Company.

Said dedication includes all that piece of ground between what has been designated as 15th street on the east and 18th street on the west, Stewart avenue on the south and Greely avenue on the north, and the plat attached to the dedication shows the right of way of the Kansas City, Wyandotte and Northwestern railway to be 100 feet wide from 15th street running west to 18th street on the west, and the right of way of 100 feet is not included in the certificate of dedication.

Defendant here rested his case.

The above and foregoing was all the evidence offered by either party on the trial of said cause.

And thereupon the defendant asked the court to give certain instructions in writing to the jury, a copy of which instructions, together with the action of the court thereon and the exceptions of the defendant thereto, being in words and figures following, to wit:

*Instructions Asked by Defendant.*

1. The jury are instructed that under the pleadings and the evidence the plaintiffs are not entitled to recover in this action, and you will return a verdict for the defendant.

Refused. Excepted to by defendant. H. L. Alden, judge.

2. The jury are instructed that the plaintiffs must prove each and every material allegation by a preponderance of the evidence.

Refused. Excepted to by defendant. H. L. Alden, judge.

3. The jury are instructed that the presumption of law in this case is that the defendant was not guilty of negligence, and it must be proved by a preponderance of testimony before the plaintiffs can recover.

Refused. Excepted to by defendant. H. L. Alden, judge.

4. The jury are instructed that the law does not presume that the child was injured by the negligence of the defendant, but the same must be proved by a preponderance of the evidence, the same as any other material fact in the case.

Refused, and excepted to by defendant. H. L. Alden, judge.

5. The jury are instructed that the fact that the accident occurred to the child is of itself no proof or presumption of negligence on the part of the defendant, but the same must be proved by a pre-
56 ponderance of the evidence before the plaintiffs can recover.

Refused, and excepted to by defendant. H. L. Alden, judge.

6. The jury are instructed that where there is no negligence on the part of the defendant, his servants or employés, and a child is killed, there can be no recovery.

Refused. Excepted to by defendant. H. L. Alden, judge.

8. The jury are instructed that the want of ordinary care on the

part of the plaintiffs in not keeping said child from said defendant's tracks would bar a recovery in this suit, and if you find from the evidence that said plaintiffs did not exercise ordinary care in keeping said child from wandering upon said railroad track, then you must return a verdict for the defendant.

Refused. Excepted to by defendant. H. L. Alden, judge.

9. The jury are instructed that if you find from the evidence that the said plaintiffs were guilty of negligence proximately contributing to the injury, in permitting the said Irene Morasch to wander away from home unaccompanied by any guardian or protector, then your verdict must be for the defendant.

Refused. Excepted to by defendant. H. L. Alden, judge.

10. The jury are instructed that in this case if you should find for the plaintiffs, that their recovery should only be nominal damages.

Refused. Excepted to by defendant. H. L. Alden, judge.

11. The jury are instructed that the plaintiffs in this case are chargeable with the knowledge as to whether their daughter had arrived at such an age and years of discretion as to make it safe for her to be permitted to wander away from home alone and unattended by a guardian or protector, taking into consideration the proximity of their house to said railroad tracks and the dummy tracks, and if the testimony in this case proves to you that the plaintiffs' said daughter was at the time of the alleged injury to her of such tender years as would make it unsafe for her to be permitted to wander away from home, knowing the proximity of the said aforesaid railroad tracks, without any guardian or protector, and that by reason of such tender years and being alone she was injured as alleged in this case, then you are instructed that the plaintiffs are guilty of contributory negligence to such a degree as would prevent them from recovering in this case, and you should find for the defendant.

Refused. Excepted to by defendant. H. L. Alden, judge.

12. The jury are instructed that if you find from the evidence that the said Irene Morasch was a minor, then in any event the plaintiffs are entitled to recover only whatever actual pecuniary benefit the said Irene Morasch might have been to them after her majority.

Refused. Excepted to by defendant. H. L. Alden, judge.

13. The jury are instructed that as a question of law great reduction of speed cannot be required outside the built-up portion of the city.

Refused. Excepted to by defendant. H. L. Alden, judge.

14. The jury are instructed that if you find from the evidence that the said Irene Morasch was on the private grounds of said defendant and not at a public crossing, then she was a trespasser upon said tracks, and the only duty that the defendant owed to her was not to wantonly and with reckless carelessness run over her after her situation was discovered.

Refused. Excepted to by defendant. H. L. Alden, judge.

15. The jury are instructed that no rate of speed is negligence as

to one who places herself upon the track where she had no right to be.

Refused. Excepted to by defendant. H. L. Alden, judge.

57 16. The jury are instructed that, as a question of law, the defendant was entitled to the exclusive use of his grounds, and if you find from the evidence that the said Irene Morasch was upon the private grounds of said defendant, then, unless you further find from the evidence that the said defendant wantonly ran over her, the plaintiffs are not entitled to recover, and your verdict must be for the defendant.

Refused. Excepted to by defendant. H. L. Alden, judge.

17. The jury are instructed that to suffer a child three years old to be on a railroad track unattended and where its presence may be unobserved by those in control of the train is negligence in the parents, which will defeat a recovery in this suit, unless the injury be willful.

Refused. Excepted to by defendant. H. L. Alden, judge.

18. The jury are instructed that it is alleged in the plaintiffs' petition that the said child was crossing the track of said railroad company at the public street crossing at 17th street, at said city of Kansas City, Kansas, and that defendant's employés failed to exercise reasonable and ordinary care on approaching said crossing, thereby causing the death of said child. If it shall appear from the evidence that said child was not injured at a public crossing, but was injured upon the private grounds of the defendant company, the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Excepted to by defendant. H. L. Alden, judge.

19. The jury are instructed that the plaintiffs' action is brought upon the theory that said child was injured at a public crossing on a public street, in Kansas City, Kansas, and the burden of proof is upon the plaintiff to establish by a preponderance of evidence this allegation.

Refused. Excepted to by defendant. H. L. Alden, judge.

20. The jury are instructed that if they find from the evidence that said child, at the time and place of injury, was upon the private grounds of the said defendant, and was not there with any right, license, or authority of the defendant, then the said child was a trespasser and the said defendant owed it no duty, except the duty not to injure it wantonly or wilfully after they had actually discovered it in a position of danger.

Refused. Excepted to by defendant. H. L. Alden, judge.

21. The jury are instructed that if they find from the evidence that deceased was a trespasser upon the private grounds of the defendant, then the defendant owed the deceased no duty whatever relative to the speed of the train until the deceased was seen and discovered to be in a position of danger; and if the jury find from the evidence that the employés in charge of said train, after they discovered the said child in a position of danger, exercised reasonable and ordinary care to avert the same by the use of the appliances then at hand for checking the speed of the train, the plain-

tiffs cannot recover herein, and your verdict should be for the defendant.

Refused. Excepted to by defendant. H. L. Alden, judge.

22. The jury are instructed that if the accident happened on defendant's track at a place where there was no public crossing and not at a station, then the deceased was a trespasser and the defendant was under no obligation to exercise any extraordinary means to ascertain whether said deceased was in such place of danger or not.

Refused. Excepted to by defendant. H. L. Alden, judge.

23. The jury are instructed that if said child came upon
58 said track suddenly out of the weeds adjoining the track and those in charge of the engine and train did not see the said child in a position of danger and had no reason to expect it where it was, and, after they, in fact, discovered it, exercised reasonable care and diligence to stop the train before it came in contact with the child, then plaintiffs cannot recover herein, and your verdict must be for the defendant.

Refused. Excepted to by defendant. H. L. Alden, judge.

24. The jury are instructed *at* the failure to give the customary signals in approaching public crossings is not negligence as to trespassers who may be crossing or using the track elsewhere.

Refused. Excepted to by defendant. H. L. Alden, judge.

25. The jury are instructed that the said child was of that tender years that it could not be guilty of negligence because of lack of capacity and understanding to appreciate and avoid danger, and by reason of its age could not understand and appreciate the significance of signals, such as blowing the whistle and ringing the bell of a locomotive engine, and the failure to give such signals, if you find that the signals were not given, cannot be held to be the proximate or even the remote cause of said injury, and therefore immaterial for your consideration in determining the question whether or not defendant's employés were guilty of negligence.

Refused. Excepted to by defendant. H. L. Alden, judge.

26. The jury are instructed that if they find from the evidence that said child was so young and of such tender years as not to be capable of appreciating and understanding the significance of signals, such as blowing the whistle and ringing the bell on a locomotive engine, and at the time of and just previous to the injury was not in the care or custody of some person who was capable of understanding and appreciating the significance of such signals, then you are instructed that the failure to give such signals, if you find there was such failure, should not be considered by you in determining the question whether or not the defendant's employés were guilty of negligence proximately contributing to the injury complained of.

Refused. Excepted to by defendant. H. L. Alden, judge.

27. The jury are instructed that this action is brought in the name and for the benefit of the father and mother of the deceased, who, under the law of this State, are the next of kin of the deceased. If, therefore, you find from the evidence that the plaintiffs or either

of them under all the circumstances failed to exercise reasonable care and caution for the protection of their said child from danger and such failure on their part contributed directly, in whole or in part, to the injury complained of, the plaintiffs cannot recover herein, and your verdict must be for the defendant.

Refused. Excepted to by defendant. H. L. Alden, judge.

28. The jury are instructed that under the petition in this case no special damage can be recovered herein.

Refused. Excepted to by defendant. H. L. Alden, judge.

29. The jury are instructed that if upon the foregoing instructions the plaintiffs are entitled to recover the jury can award no damages except such as are compensatory, with reference to the pecuniary loss which the next of kin, the plaintiffs herein, have sustained by the death of said child. In estimating the amount of such pecuniary loss the jury are not authorized or permitted to take into consideration the mental anguish or distress of the plaintiffs or the suffering and pain, if any, of the deceased. The jury should take into consideration the probable cost of support and maintenance and
59 education of the deceased, for which the plaintiffs as parents would be responsible during the minority of the deceased, and also the probable duration and expectancy of life of the deceased and the probability of the deceased contributing any pecuniary aid or assistance to the parents.

Refused. Excepted to by defendant. H. L. Alden, judge.

30. The jury are instructed that under the law of this State the father or, in case of no father, the mother of the child is entitled to the personal earnings of such child during its minority unless it has been emancipated, and in this case, if the jury find that the plaintiffs are entitled to recover, in assessing the amount of recovery they cannot take into consideration the loss of the probable earnings of the deceased during its minority.

Refused. Excepted to by defendant. H. L. Alden, judge.

31. The jury are instructed that it is admitted by the pleadings that the child was on the track with the authority of its parents, the plaintiffs herein.

Refused. Excepted to by defendant. H. L. Alden, judge.

To which refusal by the court to give each and every one of such instructions the defendant at the time duly excepted and excepts.

And thereupon the court of its own motion gave the following instructions in writing to the jury, to wit:

OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Plaintiffs,
*vs.*
NEWMAN ERB, Receiver of the Kansas City, Wyandotte and Northwestern Railroad Company, Defendant.

*Instructions of the Court.*

Plaintiffs in their petition for cause of action against the defendant, as far as relates to the issues herein for your determination, state in substance:

That heretofore, to wit, on or about the 10th day of June, 1893, said defendant was running and operating a certain railroad in and through the county of Wyandotte, State of Kansas, and was then and there operating and running said company's engines and cars thereon; that then and there said defendant had certain servants in its employ in charge of and having control and management of the engine of said company number 13, with the train thereto attached, outgoing from said city on the railroad of said company.

That it was the duty of said defendant and its employés to so operate said engine and cars as not to negligently do injury to life or property, and have at all times in its employ skilled, experienced, competent, and careful servants in and about the running and operation of its said engine and cars, and in running said engine and cars upon said tracks within the city of Kansas City to exercise care and caution and not to run through said city at a high, dangerous, and reckless rate of speed.

That on said 16th day of June the said Irene Morasch, now deceased, being then and there about twenty-two months of age, went upon said railroad tracks at a point between 17th and 18th
60 streets, in said city, when said engine number 13, with the train thereto attached, under the management and control of the servants and employés of said defendant, approached said place at a high, dangerous, and reckless rate of speed, to wit, at a rate of about 18 miles an hour, without ringing any bell or blowing any whistle or giving any alarm; but, on the contrary, the servants of said defendant having charge of said engine and cars, as aforesaid, and after the said Irene Morasch had been observed or could have been observed by them by the exercise of ordinary care and diligence, without ringing any bell, blowing any whistle, or sounding any alarm, as aforesaid, and without any slackening of the speed of said train as the same approached said point, and by reason of the negligent, careless, incompetent, and reckless management of said train of cars by said servants, drove said engine and cars with great force and speed against, upon, or over the said Irene Morasch, so that by reason thereof she, the said Irene Morasch, was then and there so injured, maimed, and crushed that she then and there died.

That said train of cars was being driven and run at a high and dangerous rate of speed at the time of said injuries through and

within the corporate limits of said city of Kansas City, contrary to the ordinances of said city in such case made and provided.

That said plaintiffs are the father and mother, respectively, and the next of kin of the said Irene Morasch, deceased; that no administrator has been appointed and no personal representatives otherwise exist to administer upon said estate.

That by reason of said acts and matters above stated said plaintiffs have been damaged in the sum of six thousand dollars, for which they ask judgment herein.

Said defendant for answer to said petition denies each and every of the allegations therein above set out, and further says that if said Irene Morasch was injured as alleged the same was not the result of any carelessness or negligence on the part of said defendant or any of its agents or employés, but was the result solely of the negligence of said plaintiffs and their failure to use reasonable and ordinary care, and further says that the said deceased at the time of said accident was on the private track of said defendant without right or authority or the permission of said defendant, its agents or employés, but was there with the consent and authority of said plaintiffs, and that said injury was not the result of any carelessness or negligence on the part of said defendant, its agents or employés, but was caused solely by the negligence of said Irene Morasch's parents.

Said plaintiff for reply denies each and every allegation of new matter contained in said answer.

Given by the court. Defendant excepts.

2. The burden of proof is upon the plaintiffs to prove by a preponderance of the evidence every material allegation of their petition. By a preponderance of the evidence is not necessarily meant the greater number of witnesses on the one side or the other, but it is that evidence which, under all the circumstances of the case, is entitled to the greater weight and its most convincing and satisfactory to the minds of the jurors.

In arriving at the weight to be given to the testimony of the witnesses the jury has the right to take into consideration the conduct and demeanor of the witnesses while testifying, their manner of testifying, their opportunities for seeing and knowing the things concerning which they have testified, their knowledge and means of knowledge concerning the matters and things about which
61 they have testified, their apparent interest or want of interest in the result of the case, and all other facts and circumstances appearing on the trial which may lead to a proper understanding of the truth of their several statements and the weight to be given to their testimony.

The jury is the exclusive judge of the facts proven, the weight of the evidence, and the credibility of the witnesses.

Given by the court. Defendant excepts.

3. Plaintiffs claim the said Irene Morasch was killed by reason of the negligence of the defendant in running said train of cars upon and over the said Irene Morasch, as alleged in the petition, as hereinbefore set out, while it is claimed on the part of the defend-

ant that the death of the said Irene Morasch was not caused by reason of any negligence upon the part of said defendant or its employés, but by reason of the negligence of said plaintiffs in allowing and permitting said Irene Morasch to be upon said tracks at the time and place alleged.

Negligence is the want of proper care, caution, and attention in the performance or failure to perform some act. It is an omission of duty either in failing to do that which a prudent and reasonable person would do or in doing that which a prudent and reasonable person would not do concerning the matters about which they may be engaged. It is a question of fact for the jury to determine, from a consideration of all the evidence in the case, whether either party was guilty of negligence in relation to the matters in controversy and the nature and degree of such negligence, if any.

4. If the jury find from the evidence that the injuries complained of and which resulted in the death of the said Irene Morasch were caused within the corporate limits of the city of Kansas City, Kansas, and at that time there was an ordinance of said city prohibiting the running of trains within the limits of said city at a greater rate of speed than six miles an hour, and do further find that at said time the servants and employés of the defendant were running the train by which said injuries were occasioned at a much greater rate of speed than six miles an hour, and that while so running said train ran upon and over the said Irene Morasch, by reason of which she was killed, such act of the persons in charge of said train is evidence of negligence on the part of said defendant, and if you further find that but for such speed of said train so running in excess of six miles an hour said train could have been stopped by the engineer in charge thereof, after he saw the said child upon the track, or by the exercise of ordinary care and prudence could have seen her upon such track and before the engine would have reached her, then said defendant will be liable for the injuries so received, unless you further find that said plaintiffs were also negligent in permitting said child to be upon said railroad track at said time.

Given by the court. Defendant excepts.

5. If the jury do not find from the evidence that the proximate cause of the injuries complained of was the running of said train within the corporate limits of said city at a speed in excess of six miles an hour, in violation of an ordinance of said city, as explained in the preceding instruction, and do find that at the time of said injuries the said Irene Morasch was on the private grounds of said defendant and not at a public crossing, then the only duty that the defendant owed to her was not to wantonly run over her after her situation was discovered by those in charge of said engine, and if you further find that after the persons in charge of said engine saw or by exercise of reasonable care could have seen her upon the track such persons were unable to stop said train before
62 reaching said child and avoid said injuries by the exercise of reasonable efforts, care, and attention on their part, then

said defendant is not liable for such injuries and your verdict will be for the defendant.

Given by the court. Defendant excepts.

6. The defendant is not responsible for the injuries complained of, if you find from the evidence that the same was the result of an accident which could not be foreseen or prevented by the use of ordinary care and prudence, and the plaintiff can only recover in this action by reason of the negligence of the defendant or its employés, substantially as in said petition stated and set out, and such negligence will not be presumed, but must be proven by a preponderance of the evidence before the plaintiffs can recover.

Given by the court. Defendant excepts.

7. The want of reasonable and ordinary care and prudence on the part of the plaintiffs in not keeping said child from wandering upon defendant's tracks would constitute such contributory negligence as would prevent recovery herein, and if the jury find from the evidence that said plaintiffs were guilty of such negligence, proximately contributing to the injuries complained of, by permitting the said Irene Morasch to wander away from home unaccompanied by any guardian or protector, or in failing to exercise reasonable and ordinary care and prudence to prevent said child from wandering upon said railroad track, then the plaintiffs cannot recover from the defendant for any injury so received, notwithstanding such defendant or its employés may have been also guilty of negligence in relation thereto.

Given by the court. Defendants excepts.

8. By reasonable and ordinary care and prudence is meant that degree of care and prudence which an ordinarily careful and prudent person would be expected to use under similar circumstances.

Given by the court. Defendants excepts.

9. If you find by a preponderance of the evidence in this case that the said Irene Morasch was killed by reason of the negligence of the defendant or its employés, without fault or want of care on the part of said plaintiffs, as hereinbefore explained, then the defendant will be liable for all pecuniary loss or damage shown by the evidence to have — sustained by said plaintiffs, as next of kin of said deceased, by reason of the death of the said Irene Morasch, but said plaintiffs are not entitled to recover for any pain suffered by the deceased, if any, nor for the mental anguish or distress of said plaintiffs by reason of the death of their said child. The amount of such pecuniary loss or damage may be ascertained by the jury from the facts proven, in connection with their own common knowledge and experience in relation to such facts as are matters of common observation. It is not absolutely necessary that any witness should have expressed an opinion as to the amount of any particular item of such loss, but the question of how this pecuniary damage is to be measured or what shall be the amount must be left largely to the discretion of the jury, to be determined by them from a fair and careful consideration of the facts and circumstances disclosed by the evidence tending to show such pecuniary loss or damage to said plaintiffs as next of kin of said deceased.

Such damages are not confined to the actual present loss which the death of said child produced, but also includes such prospective loss as the evidence shows may be sustained by them by reason of the death of such child.

In estimating such loss or damage the jury may take into consideration the position in life of the plaintiffs, the occupation
63 of the father, the condition of his health, the age of said child, her abilities to earn money had she lived, and the probable duration and expectancy of life of the deceased, and in connection therewith the probable cost of the support, maintenance, and education of the deceased, for which the plaintiffs would be responsible during her minority, had she lived, and the probability of the deceased contributing any pecuniary aid or assistance to the plaintiffs.

Given by the court. Defendant excepts.

If the jury find for the plaintiffs, the form of your verdict will be:

"We, the jury, find for the plaintiffs and assess their damages at —— dollars" (filling the blank with the amount which you find from the evidence the plaintiffs are entitled to recover).

If you find for the defendant, the form of your verdict will be: "We, the jury, find for the defendant."

Reduce your verdict to writing, sign it by your foreman, and return it into court:

Given by the court. Defendant excepts.

To the giving of which instructions and each thereof the defendant at the time specially excepted.

The foregoing were all the instructions given by the court to the jury.

And thereupon the court, by request of said defendant, submitted to the jury certain special questions of fact for their consideration and answer, a copy of which special questions, with the answers thereto made, are hereinafter fully set forth and made a part of this case-made.

And thereupon, after argument by counsel, the jury retired to consider on their verdict and answers to the particular questions of fact, and thereafter returned into court with the following general verdict, viz:

"We, the jury, find for the plaintiff and assess the damages at $1,020, ten hundred and twenty dollars.

D. W. GRINTER, *Foreman*."

Which verdict is endorsed as follows:

No. 10080. Morasch *vs.* Newman Erb, receiver, etc. Verdict. Filed Dec. 19, 1893. E. W. Towner, clerk, by H. J. Arnold, deputy.

And thereupon the jury returned into court with their general verdict the particular questions of fact, with their answers thereto, as follows, to wit:

Q. 1. Was said child killed on the grounds and right of way of the railroad operated by defendant?

Ans. Yes. D. W. Grinter, foreman.

Q. 2. Was the right of way for said track at said place where said child was killed within the limits of any city at the time the same was secured and said track constructed?

Ans. No. D. W. Grinter, foreman.

Q. 3. After said right of way was secured and said track constructed, was the land on either side thereof laid off and platted into lots and blocks?

64 Ans. Yes. D. W. Grinter, foreman.

Q. 4. When, if ever, were the corporate limits of the city of Kansas City, Kansas, extended so as to include the said right of way?

Ans. 1888. D. W. Grinter, foreman.

Q. 5. For about two months next preceding the date of said injury had plaintiffs lived in a house about 125 feet south of said railroad track?

Ans. Yes. D. W. Grinter, foreman.

Q. 6. Did the trains pass to and *fore* every day frequently on said track?

Ans. Yes. D. W. Grinter, foreman.

Q. 7. Did the plaintiffs then each know that trains passed frequently each day over said road?

And. —. D. W. Grinter, foreman.

Q. 8. Did they then each know that it was dangerous for their children to be on or near to said track?

Ans. Yes. D. W. Grinter, foreman.

Q. 9. Did they then each know that there was nothing to prevent their said child from getting onto said track if left unattended?

Ans. Yes. D. W. Grinter, foreman.

Q. 10. What precautions, if any, did they take to prevent their said child from going onto said track?

Ans. Parents had cautioned their children to keep off railroad track. D. W. Grinter, foreman.

Q. 11. Was said child killed by a regular passenger train, about ten o'clock a. m., June 16, 1893?

Ans. Yes. D. W. Grinter, foreman.

Q. 12. At said time were each said plaintiffs at home?

Ans. Yes. D. W. Grinter, foreman.

Q. 13. Did the mother of deceased, Eliza Morasch, see said child when it went out of the rear door of their house, which door was nearest to said track?

Ans. She saw it on the step. D. W. Grinter, foreman.

Q. 14. When the said Eliza Morasch saw said child go out of the door did she make any effort to restrain it?

Ans. Not at that time. D. W. Grinter, foreman.

Q. 15. Did she then know that a passenger train was then about due on said railroad?

Ans. No. D. W. Grinter, foreman.

Q. 17. Near to the end of the ties of said track was there a thick growth of weeds some two or three feet high?

Ans. Yes. D. W. Grinter, foreman.

Q. 18. As said train was going west, did said child suddenly come out from said weeds and onto said track in front of said approaching engine and train?

Ans. No. D. W. Grinter, foreman.

Q. 19. At said time were each the engineer and fireman in their proper place on said engine and looking ahead in the direction said engine was moving?

Ans. Yes. D. W. Grinter, foreman.

Q. 20. At said time was the bell on the engine ringing and had it been ringing continuously a long distance east of where said child was?

Ans. Yes. D. W. Grinter, foreman.

Q. 21. As soon as the engineer and fireman on said engine saw said child in a position of danger, did they do everything in
65 their power to *to* stop said train and prevent the accident?

Ans. No. D. W. Grinter, foreman.

Q. 22. If question 21 is answered "No," then state what they could have done which they failed to do to stop said train after they discovered said child in a position of danger?

Ans. By running at limited rate of speed. D. W. Grinter, foreman.

Q. 23. While said child was in the weeds near to said track, could it have been seen by those in charge of said train?

Ans. No. D. W. Grinter, foreman.

Q. 24. Was the injury to said child the result of accident or design?

Ans. By accident, by referring — answer in No. 22. D. W. Grinter, foreman.

Q. 25. Previous to the time that said engineer and fireman saw said child, and knew it to be a child, did they have any reason to believe that the child w .s on or near to said track?

Ans. Yes. D. W. Grinter, foreman.

Q. 26. Was the place where said child was on or near to said track a dangerous place for it to be?

Ans. Yes. D. W. Grinter, foreman.

Q. 27. Did plaintiffs then know it was dangerous and unsafe for said child to go near to said track unattended by any one?

Ans. Yes. D. W. Grinter, foreman.

Q. 28. What, if any, effort did they make to keep said child from straying on to said track?

Ans. They instructed their children to keep in and about the house. D. W. Grinter, foreman.

Q. 29. Did those in charge of said train wantonly or wilfully run said engine against said child after they discovered it in a position of danger?

Ans. No. D. W. Grinter, foreman.

Q. 30. How long would said child probably have lived but for said accident?

Ans. Thirty-five years. D. W. Grinter, foreman.

Q. 31. If the jury find a general verdict for the plaintiffs, what

amount of the same is allowed for loss of service of the said child during its minority?

Ans. Three hundred and ten dollars ($310). D. W. Grinter, foreman.

Q. 32. What would have been the probable expense to the parents of supporting and maintaining said child had she not been killed?

Ans. ($310) three hundred and ten dollars. D. W. Grinter, foreman.

Q. 33. What amount in excess of the cost of supporting and maintaining said child would said parents have received from her earnings and accumulations had she not been killed?

Ans. None. D. W. Grinter, foreman.

Q. 34. If said child had not been killed, what would probably have been her earnings and accumulations in excess of the cost and expense of support, maintenance, and education?

Ans. None. D. W. Grinter, foreman.

Q. 35. If the jury find a general verdict for the plaintiff, and fix an amount as the pecuniary loss to the next of kin, as damage, then state the elements of said damage which go to make up the aggregate of such amount.

Ans. For services from the age of majority to the age of thirty-five years. D. W. Grinter, foreman.

66 Q. 36. Estimated solely and exclusively upon the basis of money or pecuniary benefit lost by the father and mother by reason of the death of said child, and excluding any consideration for the grief and mental anguish of father and mother, in what manner have they been damaged by the death of said child?

Ans. For pecuniary loss. D. W. Grinter, foreman.

And thereupon defendant asked the court to resubmit questions of fact numbers — to the jury for more definite answers, which the court refused to do; to which defendant excepted, and thereon the jury was discharged.

And thereon, forthwith, defendant filed its motion for judgment as follows, to wit:

(Omitting caption there.)

*Motion for Judgment.*

Now comes said defendant, and moves the court to enter judgment in *his* favor, notwithstanding the general verdict of the jury, because:

First. The answers of the jury show that plaintiffs have suffered no damage which can be recovered herein.

Second. On said answers of the jury the plaintiffs have no cause of action against defendant.

Third. On said findings defendant is entitled to a judgment against plaintiff for costs.

Fourth. On said findings it appears that plaintiffs were guilty of contributory negligence.

Fifth. On said findings it appears that plaintiffs have sustained no pecuniary loss.

W. P. & B. P. WAGGENER,
*Att'ys for Def't.*

(Indorsed:) Filed Dec. 21, 1893. E. W. Towner, clerk, by H. J. Arnold, deputy.

Be it remembered that at a session of said district court for the December, 1893, term thereof, begun and held as by statute required, there being present the Honorable Henry L. Alden, judge of said judicial district; S. S. Peterson, sheriff, and E. W. Towner, clerk, the following proceedings were had in the above-entitled cause, which appear of record upon the journal of said court as of the proper date in words and figures following, to wit:

(Omitting title of cause.)

DECEMBER 18TH, A. D. 1893.

And now, on this day, this cause comes regularly on for trial, plaintiffs appearing by McGrew, Watson and Watson, their attorneys, and defendant appearing by B. P. Waggener and W. P. Waggener, *his* attorneys; and now, to try the issues joined herein, comes the following jury, to wit: D. W. Grinter, —— Myers, Jas. Lynch, Jno. Lee, Jas. Fitzgerald, S. W. Holyfield, Jno. Frances, Andrew Johnson, J. W. Kindred, J. W. Kerr, Wesley Lewis, and David Kepler, twelve good and lawful men from the body of Wyandotte county, qualified to serve as jurors herein, and tried and sworn to well and truly try the matters and things submitted to them herein and a true verdict render according to law and
67 the evidence, and the trial of this cause is proceeded with, and such trial not being completed at the hour of adjournment, the jury are duly admonished by the court as to their duties as jurors, and excused until the 19th day of December, A. D. 1893, at 9.30 o'clock a. m., to which time the further consideration of *their* cause is postponed.

It was thereupon ordered that court be, and the same was, adjourned until Tuesday, the 19th day of December, A. D. 1893.

TUESDAY, *December 19th*, 1893.

(Omitting title.)

And now, on this day, the court having met pursuant to adjournment, come the parties hereto, present as before, and, the jury having been duly called and all being present, the trial of this cause is proceeded with, and now the evidence for the plaintiff is fully heard; and thereupon comes the said defendant and files its demurrer to the evidence of plaintiff on the ground that the same does not show facts sufficient to constitute a cause of action, and arguments of counsel are fully heard, and the court, being well and fully advised in the premises, doth overrule said demurrer; to which

ruling of the court said defendant duly excepts; and thereupon the evidence of the defendant is fully heard and the court, in writing, instructs the jury as to the law in this cause governing, and arguments of counsel are fully heard, and the jury, in charge of their lawful, sworn bailiff, retire to their jury-room to consider on their verdict in this cause to be rendered.

And now the jury notify the court that they have agreed upon a verdict and are brought into open court, and the jury, *are* all present, by and through their foreman, return the following verdict, to wit:

"We, the jury, find for the plaintiff- and assess the damages at $1,020, ten hundred and twenty dollars.

D. W. GRINTER, *Foreman.*"

(Then follow- copy of the special findings of the jury, which are here omitted, having been heretofore fully set forth.)

And thereupon the jury are discharged from the further consideration of said cause.

It is therefore considered, ordered, adjudged, and decreed that said plaintiffs do have and recover of and from said defendant, Newman Erb, as receiver of the Kansas City, Wyandotte and Northwestern Railroad Company, said sum of one thousand and twenty ($1,020) dollars, with interest from this date at the rate of six per cent. per annum and costs of suit, taxed at — dollars, and thereof let execution issue.

And thereupon, to wit, on the 21st day of December, A. D. 1892, and within three days after the rendition of the verdict of the jury herein, the said defendant filed *his* motion for a new trial of this cause herein, a copy of which motion is as follows, to wit:

(Omitting caption.)

*Motion for New Trial.*

Defendant moves the court for a new trial for the following reasons, to wit:

First. The verdict and findings of fact are not sustained by sufficient evidence.

Second. Error of law occurring at the trial and duly excepted to at the time.

Third. Error in the assessment of damages, the same appearing to have been given under the influence of passion and prejudice, and not sustained by sufficient evidence.

68 Fourth. Because the court received incompetent evidence over the objection and subject to the exception of defendant.

Fifth. Because the answers of the jury to the particular questions of fact are inconsistent with the general verdict and in conflict with each other.

Sixth. The verdict is contrary to law.

B. P. & W. P. WAGGENER,
*Att'ys for Def't.*

(Indorsed:) Filed Dec. 31, 1893. E. W. Towner, clerk, by H. J. Arnold, deputy.

Be it remembered that at a session of said district court for said December term, A. D. 1893, there being present all the officers of said court as before, the following further proceedings were had in the above-entitled cause and appear of record upon the journal of said court as of the proper date in words and figures following, to wit:

(Omitting title of cause.)

DECEMBER 23RD, A. D. 1893.

And now, on this day, this cause comes regularly on for hearing on the motion of defendant herein filed to enter judgment in *his* favor, notwithstanding the general verdict of the jury, on the grounds in said motion set forth, the parties appearing by their attorneys respectively, and arguments of counsel are fully heard, and the court, being well and fully advised in the premises, doth overrule said motion; to which ruling of the court said defendant duly excepts.

And thereupon said cause comes further on for hearing upon the motion of defendant herein filed for a new trial of said cause, on the grounds in said motion set forth, the parties appearing as before, and arguments of counsel are fully heard, and the court, being well and fully advised in the premises, doth overrule said motion; to which ruling of the court said defendant duly excepts.

And thereupon comes said defendant and asks and is allowed sixty (60) days in which to make and serve a case-made for the supreme court, and plaintiff- *is* allowed twenty (20) days thereafter to suggest amendments thereto, case-made to be settled on five (5) days' notice by either party.

The within and foregoing is here tendered as a true and perfect case-made, containing all the pleadings, motions, evidence, instructions, findings of fact, verdict, journal entry of judgment, and is a complete history of said case.

W. P. WAGGENER,
*Attorney for Defendant.*

Service duly made on us this 13th day of Feb'y, 1894.
McGREW, WATSON & WATSON,
*Attorneys for Plaintiffs.*

OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased,
*vs.*
NEWMAN ERB, as Receiver of the Kansas City, Wyandotte and Northwestern Railroad Company.
No. 10080.

69 Now, on this 2d day of March, 1894, the parties appearing, by their respective attorneys, and consenting thereto, the within and foregoing is allowed as a true and perfect case-made for

the supreme court, and the clerk is instructed to file and authenticate the same as such.

Witness my hand this 2nd day of March, 1894.

HENRY L. ALDEN,
*District Judge.*

I hereby certify the within and foregoing is the original case-made *is* allowed and signed by the judge of said court and filed in my office.

Witness my hand and official seal this 2nd day of March, 1894.

E. W. TOWNER,
*Clerk of District Court,*
[SEAL.] By H. J. ARNOLD, *Deputy.*

Filed this 2nd day of March, 1894.

E. W. TOWNER,
*Clerk of District Court,*
By H. J. ARNOLD, *Deputy.*

We hereby waive the issuance and services of summons in error and enter appearance of defendant- in error to the petition of plaintiff in error.

McGREW, WATSON & WATSON,
*Attorneys for Defendant- in Error.*

Filed Apr. 11, 1894.

C. J. BROWN,
*Clerk Sup. Court.*

(Page 114 is blank.)

In the Supreme Court of the State of Kansas.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*vs.*
OTTO J. MORASCH and ELIZA MORASH, as Next of Kin of Irene Morasch, Deceased, Defendant- in Error.

*Security for Costs.*

We and each of us enter as security for all costs which may accrue to said defendant- in error or to the officers of this court herein, and in default of payment by said plaintiff in error of said costs, and after ten days' notice, we agree that execution may issue against our property for unpaid costs.

B. P. WAGGENER,
Per W. P. WAGGENER.

Approved and filed Apr. 11, 1894.
C. J. BROWN,
*Clerk Sup. Court.*

70 And thereafter said cause remained duly pending in this court until and on the 14th day of June, 1898, when pro-

ceedings were had therein, as appears by the entry thereof upon Journal "A" of this court, at page 373, which is in words and figures as follows, to wit:

Kansas Court of Appeals, Northern Department, Eastern Division.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte and Northwestern Railroad Company, Plaintiff in Error,
*v.*
OTTO J. MORASCH ET AL., Defendants in Error.
} No. 268.

This cause comes on to be heard upon the petition in error and case-made from the district court of Wyandotte county; and thereupon, after oral argument by A. H. Horton, of the firm of Waggener, Horton and Orr, on behalf of plaintiff in error, said cause is submitted on briefs of counsel for both sides and taken under advisement by the court.

And thereafter and on the 17th day of September, 1898, proceedings were had in said cause, as appears by the entry thereof upon Journal "A" of this court, at page 412, which is in words and figures as follows, to wit:

Kansas Court of Appeals, Northern Department, Eastern Division.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*v.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error.
} No. 268.

Now, on this 17th day of September, 1898, this cause comes on for decision, and thereupon it is ordered by the court that the judgment of the court below be affirmed; and it is further ordered that the plaintiff in error pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

Mahan, P. J., delivered the opinion of the court.

And on the same day the court rendered and handed down their written opinion in said cause, which is in words and figures as follows, to wit:

71 Kansas Court of Appeals, Northern Department, Eastern Division.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*vs.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error.
} No. 268.

*Syllabus.*

1. In an action under section 422 of the Code, it is not required that the petition shall state how the plaintiffs were injured pecuniarily to state a cause of action, nor is it necessary that it allege special damages to entitle the plaintiff to a verdict.
2. Ordinance No. 522 of Kansas City, Kansas, making it unlawful for any railway engine or train of railroad cars to run within the city limits at a speed exceeding six miles an hour, is not void because section 8 exempted from its provisions the Interstate Rapid Transit Railway Company, it appearing that the excepted company is a street car line and not in fact a railroad, within the same situation and conditions as ordinary railways, to which the provisions of the ordinance was intended to apply.
3. The application of the requirements of the ordinance to the defendant's trains under existing conditions was not unreasonable restraint upon the defendant or upon commerce, because the place where the killing occurred was within the suburbs of the city and not upon a highway or street crossing.
4. The ordinance is not obnoxious to the provisions of the fourteenth amendment to the Constitution of the United States. (Railroad Co. *v.* Richmond, 96 U. S., 521.)
5. The ordinance is not obnoxious to the constitutional provisions of the State in not having a uniform operation because of the exception attempted to be made by section 8 thereof.
6. The failure of the defendant to observe the provisions of the ordinance by running its train within the city at a speed of fifteen miles an hour was negligence of which the deceased could have legally complained had she survived the injury, although at the time she was upon the defendant's unfenced track, not at any street crossing, and without license of the company thereto.

ERB, Receiver,
*v.*
MORASCH.

72 Error from Wyandotte district court.—Hon. Henry L. Alden, judge. Affirmed.

*Opinion. Filed September* 17, 1898.

Waggener, Horton & Orr, attorneys for plaintiff in error.
McGrew, Watson & Watson, attorneys for defendants in error.

MAHAN, *P. J.:*

This is an action begun in the district court of Wyandotte county by the defendants in error against the plaintiff in error, under section 422 of the Code of Civil Procedure, to recover damages on account of the death of the infant daughter of the plaintiffs, whose death the petition alleges was occasioned by the operation of defendants' passenger train on the sixteenth day of June, 1893. The child was about thirty four months old at the time it was killed.

The petition alleges that the child was killed on the right of way of the railway, not at the crossing of any public highway or street within the corporate limits of the city of Kansas City, Kansas; that the train was being run at a high, dangerous, and reckless rate of speed within the city limits, in violation of the ordinance of the city; that the servants of the defendant in charge of the train were likewise negligent in not stopping the train or making any effort to slack its speed or get it under control after they had observed the child upon the railway track.

The defendant answers, first, by a general denial of all of the allegations of the petition except such as are confessed; it admits the incorporation of the railway company, and that the defendant was the duly appointed, qualified, and acting receiver of the road, as alleged in the petition. They deny specifically that there was any ordinance in the city of Kansas City regarding the speed of trains. They deny that the train was run at an excessive rate of speed; allege that if the deceased was injured as alleged it was not the result of any negligence on the part of the defendant, his agents, or employees, but was the result of the negligence of the plaintiffs in their failure to use reasonable and ordinary care regarding the child.

The plaintiffs replied by general denial to the allegations of the answer made by way of defense. The case was tried to a jury and resulted in a verdict for $1,020 for the plaintiffs.

The jury also returned with their general verdict answers to thirty-six special interrogatories submitted by the defendant, many of which the trial court ought to have refused to submit to the jury.

The material findings of the jury are that the child was killed on the right of way of the railroad company; that part of the railway right of way where the child was killed is within the corporate

limits of the city of Kansas City, Kansas; that the house in which the plaintiffs lived at the time the child was killed was one hundred and twenty-five feet south of the railroad track, and that the plaintiffs had lived there about two months prior to the accident; that trains passed to and fro on this line frequently, and the defendants knew this, and that it was dangerous for their children to be on or near the track; that they knew further that there was nothing to prevent this child from going onto the track if left unattended; that the parents were not negligent with regard to their care of and attention to the child; that the right of way of the railway company at the time of the accident was grown up with weeds to near the end of the ties, some two or three feet high; that the engineer and fireman were in their proper places, looking ahead in the direction said engine was moving, at the time of the accident;
73 that the bell was being rung continuously; that the engineer and fireman did not, as soon as they discovered the child in a position of danger, do everything that might have been done to stop the train and prevent the death of the child; that if the train had been observing the provisions of the ordinance as to speed within the city limits the child would not have been killed; that the failure to observe the requirements of the ordinance resulted in the death of the child; that the engineer and fireman did not wantonly and wilfully run the engine over the child after they discovered it.

There was a motion by the defendant for judgment on the special findings, notwithstanding the general verdict, which was denied; a motion for a new trial on the statutory grounds, which was likewise denied, and the plaintiffs thereupon had judgment upon the verdict.

We will consider the errors assigned in the order in which they appear in the brief of the plaintiff in error.

First. That the verdict and findings of fact are not sustained by sufficient evidence. There is no doubt in our mind but that the evidence fully warranted the verdict and findings of the jury.

The second assignment is of a general character and is of errors of law occurring at the trial and duly excepted to at the time. Under this assignment counsel contend, first, that the petition was defective; that there was no sufficient allegation of pecuniary or special damage to the plaintiffs as next of kin. It is sufficient to say that as to special damages there was none claimed or allowed, but only such general damages as are contemplated by the provisions of the statute giving the right of action. It is not necessary for the petition to contain allegations of the particular loss to plaintiffs occasioned by the death of the infant nor the evidence by which they expected to sustain the allegation of damage. The general allegation was sufficient. While the question of pleading was not specifically in controversy or passed upon in the case of K. P. R'y Co. *vs.* Cutter, 19 Kan., 83, yet this deduction logically follows the decision in that case. See also Railroad Co. *v.* Barron, 5 Wall., 90. There was no motion to require the plaintiff to make it more definite and certain, but the objection was a general one to

the introduction of the evidence under the petition, and the only question to be decided is, did the petition state a cause of action?

The next assignment is that the court erred in receiving incompetent evidence; and under this head counsel contend that the court erred in admitting in evidence an ordinance, number 522 of the city of Kansas City, Kansas, under the objection that the ordinance was upon its face void because of the provisions of section 8, which are as follows:

"The provisions of this ordinance shall not apply to the Inter-State Rapid Transit Railway Company, excepting with reference to funerals or other processions."

Upon this objection being made the plaintiffs introduced evidence tending to show that the Interstate Rapid Transit Railway Company was in fact a street car line operated with electrical engines, and was not within the provisions of section 2 of the ordinance at all, which is the section applicable to the case. The ordinance in our view was not void and was competent evidence to be admitted in the case (Meek *v.* Pennsylvania Co., 38 Ohio St., 632; Correll *v.* Railroad Co., 38 Iowa, 120).

There was a further objection to the introduction of the ordinance in the case that it was unreasonable and in restraint of commerce because of the fact that the part of the city where the acci-
74 dent occurred was uninhabited, and therefore there was no reason to impose this restraint upon commerce such as exists in the more populous parts of a city. Had the track of the railway company been fenced, as in some of the cases referred to by counsel in the brief, and had the country where the accident occurred been agricultural grounds, the objection might have been tenable, but the evidence in the record discloses the fact that that portion of the city where the accident occurred is not thinly populated and is not agricultural lands; that the track of the company was not fenced, but that all the dangers to which the inhabitants of the city were subjected existed in that part of the city as well as in any other part, though probably not to so great a degree, but it was simply a matter of degree.

It is further contended that the ordinance is obnoxious to the provisions of the fourteenth amendment to the Constitution of the United States. This contention cannot be sustained (Railroad Co. *v.* Richmond, 92 U. S., 521).

It is again contended that the ordinance is obnoxious to the constitutional provision of the State; that it is not uniform in operation. It is only necessary that an ordinance of a municipality affect all in the same situation or under the same conditions alike, and that so far as the application of the ordinance to railways it is uniform in its operation. The exception of the Inter-State Rapid Transit railway, as heretofore stated, was unnecessary, as the same conditions did not exist with respect to that road that existed at the time of the passage of the ordinance with respect to the class to which the plaintiff in error belongs. It is true that at the time of the enactment of the ordinance, as contended by counsel for plaintiff in error, the railroad excepted used dummy engines. It

is true that they are dangerous and capable of a higher rate of speed than the limit fixed by the ordinance, but it was a street railway carrying passengers from street to street and point to point within the cities of Kansas City, Kansas, and Kansas City, Missouri, and the parks, being suburbs of Kansas City, Kansas. There was no occasion for the passage of this ordinance, so far as this road was concerned; its provisions were not applicable to it. Even if they might have applied and even if the conditions of the Inter-State Rapid Transit road were such as to make all the conditions of the ordinance applicable to it, and conceding, for that reason, that that provision of the ordinance was unreasonable and void, it would not necessarily follow that the other provisions of the ordinance would be void under the rules stated and authorities cited in counsel's brief. This exception was not an essential part of the ordinance; it does not appear that the council would not have passed the ordinance itself but for the exception.

Under the second assignment of error and in the fifth paragraph of counsel's brief they argue the question that the court erred in overruling the demurrer to the plaintiffs' evidence. In our view of the case there was sufficient evidence to go to the jury, and especially in view of the fact that the defendant was running its train in violation of an express ordinance of the city. It is contended that this ordinance did not apply to the case, because the accident did not occur at any street crossing. We cannot agree with counsel in this contention. The ordinance does not limit its application in terms to the highways of the city, but says within the city limits. The track of defendant's railway was unfenced. The passengers upon the defendant's train were subjected to
75 wreck, damage, and death there as much as upon the part of the track crossing highways or within the limits of a highway. The ordinance was doubtless passed by the council having in view the facts as they existed at the time, and the ordinance was doubtless intended to prevent accident to the passengers being carried by railways as much as to protect the lives of the inhabitants of the city; and it was just as necessary, under the conditions that existed, that the ordinance should apply to that part of the defendant's right of way and track not within the limits of a highway as within such limits. The application would be a reasonable one and there can be no reasonable objection urged against it.

The next assignment of error is that the court erred in refusing to give certain instructions requested by the defendant. The substance of the third, fourth, fifth, and seventh requests was given clearly and expressly by the court in its general charge. The thirteenth instruction complained of by counsel is as follows:

"The jury are instructed that, as a question of law, great reduction of speed cannot be required outside of the built up portion of the city."

This instruction is not applicable to the case. It would have been misleading had it been given.

The substance of the fourteenth request was given.

The fifteenth request is that no rate of speed would be negligence

as affecting one who was on the track of the railway company without right. We cannot construe this to be a correct principle of law. Put in hard Anglo-Saxon, it is: "You are a trespasser on our line. We had the right to the exclusive use of our track. We owed you no duty except not to deliberately murder you, and we cannot be held accountable unless the conduct of our agents would warrant their conviction upon a charge of murder, or at least manslaughter; that therefore the city ordinance cannot aid you—cannot add to our duty towards you. As to a trespasser, it is immaterial whether we were conducting our business in express violation of law." It was frequently contended for, but we cannot concede, that an infant by going upon a railroad track without license from the company is without right of protection under the law of the land. As we have heretofore argued, this ordinance was doubtless intended to apply as much to that part of the track of the defendant company as to any part of it, and that it was intended for the protection of citizens who might be upon the track of the railway outside of the highway as well as upon other parts under the circumstances as they existed. Had the railway company seen fit to fence its track with such a fence as would *be* excluded infants and possibly others from being upon its tracks, then the rule contended for might have some reasonable application; but so long as railroad companies operating engines with trains of cars attached within cities, which are conceded to be highly dangerous to life and limb, without excluding the public from their tracks, they ought not to be heard to say that an infant — at least without the protecting provisions of the rules governing the inhabitants of the city simply because she was there without a license from the company. We cannot concede that it is of greater importance to society—and laws are for the government of society at large—that a train should reach a given destination at a given hour or minute than the lives of persons who may possibly be trespassers upon the unfenced right of way of a railway company should be preserved or protected.

The real question is, Was there any duty, public or private,
76 which the defendant owed to the deceased infant which it failed or omitted to perform? Admitting that it had the right to the exclusive use of its track—that the infant was there on the track without a license—under the ordinance of the city as well as by the dictates of humanity the company owed to the infant as well as to every other member of the public, a resident of the city or sojourning therein, not to run its trains at a dangerous speed within the city limits, a speed that would be dangerous to persons on the track with or without license; and in this it failed. It was conducting its business in violation of the laws of the city in which it was. It is found by the jury that but for this violation of duty the death of the child could and would have been avoided.

The sixteenth, twenty-first, twenty-second, twenty-third, and twenty-seventh requests were given in the court's general charge.

Number one, of which special complaint is made, is a direction to the jury to find for the defendant. Under the facts as they existed, as heretofore stated, it was not error to refuse this.

The foregoing are all the instructions specifically mentioned in brief of counsel for plaintiff in error.

The next assignment of error is that the court overruled the motion of the defendant in error for judgment upon the special findings. The special findings support the verdict of the jury. It would have been error to have sustained the motion. While there are some slight apparent inconsistencies between some of the findings, there is nothing of such a nature that would have warranted the court in granting the motion for judgment as against the substantial findings, which determined in fact the rights of the parties in the case.

Counsel contend further that the material findings of the jury were not supported by any evidence. If the ordinance complained of was eliminated from the record, there might be a fair ground for contending that the court erred in sustaining the findings of the jury that the child's death was caused by the negligent *act* of the servants and agents of the defendant; or had the accident occurred outside of the city limits, in a rural district, a sparsely populated community, it might be said with some show of reason that the evidence did not disclose but that the engineer and fireman did all they could to preserve the life of the child after they say they recognized it as a child.

The seventh assignment of error is that the court overruled the defendant's motion for a new trial. A careful scrutiny of the record, aided by the diligence of counsel, has not enabled us to discover anything in the record that was error materially affecting the rights of the defendant. There was no ground for granting a new trial.

The eighth assignment is that the verdict is contrary to law. It follows from what we have said heretofore that this assignment cannot be sustained, and these remarks likewise apply to the ninth, which is because the verdict is not sustained by sufficient evidence.

The judgment of the trial court is affirmed.

77 Kansas Court of Appeals, Northern Department, Eastern Division.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*vs.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error.
} No. 268.

STATE OF KANSAS, *Shawnee County*, } *ss:*

I, W. H. Thompson, clerk of the Kansas court of appeals, northern department, eastern division, do hereby certify that the above and foregoing are full, true, and correct copies of the order of certification by the supreme court, the petition in error, case-made, entry of appearance and waiver of summons in error, bond for costs, and the opinion of the court in the above-entitled cause, as the same appear

on file in my office; and I do further certify that the above and foregoing contain full, true, and correct copies of the journal entry of submission and journal entry of judgment in the above-entitled cause, as the same appear of record in my office; and I do further certify that the amount of accrued costs in this and the supreme court in this cause to this date amount to $43.90, and that $5.00 was deposited in the supreme court upon the filing of the said case therein.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Topeka, this 5th day of October, 1898.

W. H. THOMPSON,
*Clerk Kansas Court of Appeals, Northern Department, Eastern Division,*
[SEAL.] By J. A. McDERMOTT, *Deputy.*

STATE OF KANSAS, } ss:
*Shawnee County,* }

I, W. H. Thompson, clerk Kansas court of appeals, northern department, eastern division, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above-entitled cause.

In testimony whereof I have hereunto set my hand and seal of said court this 10th day of October, 1898.

W. H. THOMPSON,
[SEAL.] *Clerk Kansas Court — Appeals, Northern Department, Eastern Division,*
By J. A. McDERMOTT, *Deputy.*

78 And also, on the same day, there was issued from the office of the supreme court of the State of Kansas a summons in error, which, with the endorsements thereon, including the return of the sheriff, showing service of the same, is in words and figures as follows, to wit:

79 STATE OF KANSAS, } ss:
*Supreme Court,* }

The State of Kansas to the sheriff of Wyandotte county, Greeting:

You are hereby commanded to notify Otto J. Morasch and Eliza Morasch, as next of kin of Irene Morasch, deceased, defendants in error, that Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, plaintiff in error, did, on the 6th day of October, A. D. 1898, file in the clerk's office of the supreme court of Kansas a petition in error and transcript of record, the object of which is to obtain a reversal of a certain judgment rendered by the court of appeals, N. D., E. D., sitting within and for the eastern div., northern dep., State of Kansas, in an action pending before said court, wherein the said plaintiff in error was plaintiff in error and the said defendant in error was defendant in error.

You will make due return of this summons in error on or before the 17th day of October, A. D. 1898.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Topeka, this 6th day of October, A. D. 1898.

JNO. MARTIN,
*Clerk Supreme Court,*
By F. J. FRITCH, *Dep.*

[SEAL.]

STATE OF KANSAS, } ss:
*County of Wyandotte,* }

I received this summons in error on the 7th day of Oct., 1898, at 10 o'clock a. m., and served the same on the 7 day of Oct., 1898, by delivering to A. E. Watson personally, one of the members of the firm of McGrew, Watson & Watson, att'ys of record for within-named defendant in error, a true copy of said summons in error.

J. W. LONGFELLOW, *Sheriff.*

*Fees.*

| | |
|---|---|
| Service | .40 |
| Mileage | |
| Copy | .25 |
| Total | .65 |

80 (Endorsed:) No. 11288. Supreme court, State of Kansas. Newman Erb, receiver, etc., *vs.* Otto J. Morasch *et al.* Summons in error. Issued October 6th, 1898; returnable Oct. 17, 1898. Filed Oct. 11, 1898. Jno. Martin, clerk supreme court. —— ——, attorney for plaintiff in error.

81 And be it further remembered that on the 10th day of November, 1898, the same being one of the judicial days of the July, 1898, term of the supreme court of the State of Kansas, the said court being in session at the supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice, and the Honorable William A. Johnston and the Honorable Stephen H. Allen, associate justices, the following proceeding was had and remains of record, to wit:

82 *Journal Entry of Assignment.*

The following cases were ordered assigned for hearing at the January, 1899, session of this court:

* * * * * * *

| Title of case. | No. | Page. |
|---|---|---|
| Erb, receiver, etc., *vs.* Morasch *et al.* | 11288 | 16 |

* * * * * * *

83 And be it further remembered that on the 22nd day of December, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas proof of the service of the

brief of the plaintiff in error, which is — words and figures as follows, to wit:

84 KANSAS CITY, KANSAS, *December 17th*, 1898.

Received of Albert H. Horton, assistant attorney Mo. Pacific R'Y Co., a copy of the brief of plaintiff in error in case No. 11288, of Erb *v.* Morasch, in the supreme court of the State of Kansas, and service of the same is hereby acknowledged.

McGREW, WATSON & WATSON,
*Att'ys for Def't in Error.*

(Endorsed:) 11288. Proof of service of brief of plaintiff in error. Filed Dec. 22, 1898. Jno. Martin, clerk supreme court.

85 And be it further remembered that on the 4th day of January, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a motion to dismiss, which, with the endorsements thereon, is in words and figures as follows, to wit:

86 In the Supreme Court of the State of Kansas.

NEWMAN ERB, Receiver, etc., Plaintiff in Error,
*vs.*
OTTO J. MORASCH ET AL., Defendants in Error. } # 11288.

*Motion to Dismiss.*

Now comes the defendants in the above-entitled action and move the court to dismiss the petition in error in the said cause for the reason that said cause was tried by the Kansas court of appeals, northern department, eastern division, and that said cause is one on which said Kansas court of appeals had final jurisdiction, and that said plaintiff in error is not entitled, as a matter of right, to an appeal to the supreme court of Kansas; that said plaintiff in error, on October 3rd, A. D. 1898, made an application to this honorable court for an order that said cause be certified to it from said Kansas court of appeals, and that said application was, on October 10th, A. D. 1898, by the court denied; that the amount in controversy, exclusive of interest and costs, is less than $2,000.00, and that for said reason and because the said plaintiff in error is not entitled, as a matter of right, to an appeal to this court from the decision of the Kansas court of appeals, said cause should be dismissed.

Wherefore said defendants in error move the court that the petition in error in the above entitled cause be dismissed.

McGREW, WATSON & WATSON,
*Attorneys for Defendants in Error.*

87 And also, on the same day, there was filed in the office of the clerk of the supreme court of the State of Kansas a notice

of motion to dismiss and acknowledge- of service of a copy of said notice, which, with the endorsements thereon, is in words and figures as follows, to wit:

88 In the Supreme Court of the State of Kansas.

NEWMAN ERB, Receiver, etc., Plaintiff in Error,
*vs.*
OTTO J. MORASCH ET AL., Defendants in Error.

*Notice.*

The plaintiff in error in the above entitled action and Waggener, Horton & Orr, his attorneys of record, are hereby notified that the defendants in error have filed their motion to dismiss the petition in the above-entitled cause, and that said motion will be called for hearing before the court on the 10th day of January, A. D. 1899, at 9 o'clock a. m. of said day, or as soon thereafter as counsel can be heard in the premises.

A copy of said motion to dismiss is hereto attached and made a part hereof.

McGREW, WATSON & WATSON,
*Attorneys for Defendant in Error.*

We hereby acknowledge service of a copy of the above notice and the motion thereto attached this the 22nd day of December, A. D. 1898.

WAGGENER, HORTON & ORR,
*Attorneys for Plaintiff in Error.*

(Endorsed:) # 11288. Erb, receiver, *vs.* Morasch *et al.* Motion to dismiss and notice of same. Filed Jan. 4, 1899. Jno. Martin, clerk supreme court

89 And be it further remembered that on the 13th day of January, 1899, the same being one of the regular judicial days of the January, 1899, term of the supreme court of the State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston, and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, to wit:

90 *Journal Entry of Submission.*

NEWMAN ERB, Receiver, etc., Plaintiff in Error,
*vs.*
OTTO J. MORASCH ET AL., Defendants in Error. } No. 11288.

This cause comes on to be heard on the petition in error and the transcript of the record of the court of appeals of the northern department, and also comes on to be heard the motion of defendants in error to dismiss this cause; and thereupon, after oral argument

by A. H. Horton for the plaintiff in error and by G. W. Watson for the defendants in error, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

91 And be it further remembered that on the 11th day of February, 1899, the same being one of the regular judicial days of the January, 1899, term of the supreme court of the State of Kansas, said court being in session at its court —, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record as follows, to wit:

92 *Journal Entry of Decision.*

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railway Co., Plaintiff in Error,
*vs.*
OTTO J. MORASCH ET AL., Defendants in Error.
No. 11288.

This cause comes on for decision, and thereupon it is ordered and adjudged that this cause be dismissed. It is further ordered that plaintiff in error pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

93 And also on the said 11th day of February, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas the syllabus and opinion of said court in this cause, which are in words and figures as follows, to wit:

94 NEWMAN ERB, as Receiver of the Kansas City, Wyandotte and Northwestern Railroad Company,
*vs.*
OTTO J. MORASCH ET AL.
No. 11288.

Error from the court of appeals dismissed.

*Syllabus by the Court—Smith, J.*

1. Where proceedings in error are commenced in this court, as a matter of right, to review a decision of one of the courts of appeals under a claim that the case is one involving the constitution of this State or the Constitution of the United States, as provided in section 31, chap. 84, Gen. Stat. 1897, this court will not assume or retain jurisdiction from the mere fact that the constitutional rights of a party are alleged to have been infringed, but will examine into the questions involved to ascertain whether there are any substantial reasons for the claim.
2. The contention of the plaintiff in error, that his constitutional rights were violated, being manifestly without foundation, the proceedings in error will be dismissed.

95 NEWMAN ERB, as Receiver of the Kansas City, Wyandotte and Northwestern Railroad Company,
*vs.*
OTTO J. MORASCH ET AL. } 11288.

Error from the court of appeals dismissed.

The opinion of the court was delivered by SMITH, J.:

This action was brought in the district court of Wyandotte county by Otto J. Morasch and Eliza Morasch, the father and mother of Irene Morasch, to recover damages against the plaintiff in error for the death of said Irene Morasch, an infant about twenty-two months old, said death being caused, as alleged, by a passenger train negligently operated by the engineer and trainmen of the receiver running upon and over said infant. The accident occurred within the corporate limits of Kansas City, Kansas, a city of the first class.

Plaintiffs below recovered a verdict for the sum of $1,020, and judgment was rendered accordingly. On proceedings in error to the court of appeals, northern department, the judgment was affirmed. 54 Pacific Rep., 323. Afterwards and on October 3rd, 1898, the plaintiff in error made an application to this court for a certificate of review, seeking to have the decision of the court of appeals reversed for errors committed by that tribunal in the consideration of the case. This application was addressed to the discretion of this court under section 23 of chap. 82 of the General Statutes of 1897 and was denied. The plaintiff in error, on October 6th, 1898, filed in this court a copy of the case-made and transcript upon which the cause was considered in the court of appeals, together with a petition in error containing twenty-one assignments, and had summons in error to issue to said defendants in error.

96 A motion has been filed by defendants in error to dismiss the cause, for the reason that an appeal to this court by plaintiff in error cannot be considered as a matter of right.

This last attempt to invoke the action of this court in the case proceeds upon the theory that the plaintiff in error is entitled to have the decision of the court of appeals reviewed here as a matter of right under section 31, chap. 84, Gen. Statutes of 1897, which reads:

"Proceedings in error may be taken from the judgment of the courts of appeals to the Supreme Court in any action or proceeding where the courts of appeals have original jurisdiction, or in any case involving the tax or revenue laws of this State, or the title to real estate, or the constitution of this State, or the Constitution, laws or treaties of the United States."

The establishment of the courts of appeals was intended to relieve the crowded docket of this court, and to save litigants from that long delay in the hearing of causes which theretofore in some instances resulted in a practical denial of justice. It is important, therefore, to parties litigant that in aid of the prompt administration of justice this court should refuse to entertain jurisdiction of

causes brought here from the courts of appeals, unless the right to review the action of those courts is clear and undoubted under said section 31, or unless errors are pointed out which challenge the attention of this court to a degree demanding an order for the removal of the cause here for rehearing.

In the case at bar a review of the decision of the court of appeals is sought for the reason that that court sustained the validity of a city ordinance limiting the speed of railway trains within
97 the city limits to six miles per hour, which ordinance excepted from its application the Inter-State Rapid Transit railway. It is claimed that this ordinance, enacted under legislative authority, not only violates section 17, article 2, of the constitution of Kansas, securing uniformity of all laws of a general nature throughout the State, but that it infringes upon the provisions of the fourteenth amendment to the Constitution of the United States, providing that "no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The ordinance was material evidence in the trial court, and its violation by the servants of the receiver constituted the chief charge of negligence.

It was established at the trial that the excepted company, the Inter-State railway, was a street railway company operating a line of road for the carriage of passengers only along and over the streets and alleys of Kansas City, Kansas; that the road operated by the plaintiff in error was an ordinary railroad for the carriage of both passengers and freight. At the time of the passage of the ordinance the street railway cars of the Inter-State Company were propelled by "dummy" locomotives using steam, but at the time of the accident the use of steam had been abandoned and electricity substituted as a motive power.

It is not contended by the plaintiff in error that there was any lack of power in the municipality to regulate the speed of railroad cars and trains running through its limits, but that the ordinance in question discriminates in favor of the Inter-State railway, which was operated in a manner and with propelling force alike in
98 all respects to the railroad then in the hands of the receiver. If there had been no evidence offered in the case explanatory of the workings of the Inter-State Rapid Transit Railway Company, it might be inferred from the face of the ordinance that the exception exempted from its penalties a railway similar to that operated by the plaintiff in error. The evidence heard in the trial court, however, showed that the Inter-State railway was designed and operated merely to facilitate travel and communication upon the public highways of the city, furnishing to the inhabitants of the municipality ready and rapid transportation from one part of the town to another.

Can it be said, then, that a question is here presented which involves the constitution of this State or the constitution or laws of the United States? It is clear to us that the legislation enacted by the city council is not obnoxious to the provisions of the constitu-

tion of this State nor to the fourteenth amendment to the Constitution of the United States.

The mere assertion of an infringement of constitutional rights, when the claim appears to be merely colorable, cannot move this court to assume or retain jurisdiction of a cause for the purpose of review. This court will look beyond the alleged deprivation of rights guaranteed to ascertain whether the wrongs complained of have any substantial foundation in law or reason. Were it otherwise, the ingenuity of counsel would be constantly exercised in the pursuit and discovery of questions in a case "involving * * * the constitution of this State or the Constitution, laws, or treaties of the United States," and, however remote and shadowy, compel the review here of decisions intended by the law to be final in
99 the courts of appeals. If the jurisdiction of this court depends upon the mere contention of a party that the constitution of this State or the Constitution or laws or treaties of the United States are involved, then inquiry is stifled, and investigation into the good faith or soundness of the contention is a useless labor.

It is clear to us that the ordinance received in evidence was a mere police regulation governing the speed of ordinary steam railroad engines and cars only, and that the exception of a street railway from the penalties prescribed by the same was not class legislation, nor were the constitutional rights of the appellant infringed thereby.

The motion to dismiss the proceedings in error will be sustained, all the justices concurring.

A true copy.

Attest:

____ ____,
*Clerk Supreme Court.*

100 And — it further remembered that on the 25th day of February, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for a rehearing, which, with the endorsements thereon, is in words and figures as follows, to wit:

101 In the Supreme Court of the State of Kansas.

| | |
|---|---|
| NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error, | |
| *v.* | No. 11288. |
| OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error. | |

*Petition for Rehearing.*

Now comes here the said Newman Erb, plaintiff in error, as the receiver of the Federal court, sitting in and for the district of Kansas, of the Kansas City, Wyandotte & Northwestern Railroad Company, and shows to the court that he is entitled to a rehearing in

the above-entitled action for the following reasons and on the following grounds, to wit:

That the questions decisive of the rights of the said receiver of the Federal court in and for the district of Kansas and also as decisive of this case and duly submitted by counsel have been overlooked by the court.

The record in this case squarely raises several Federal questions. Newman Erb prosecuted his proceeding of error in this court to reverse and vacate the decision and judgment of the Kansas court of appeals, as receiver and officer of the United States circuit court in and for the district of Kansas, and thereby upon the record a Federal question is raised and presented.

Again, it clearly appears from the errors complained of in the petition in error and the record thereto attached that the Kansas court of appeals in deciding and disposing of this case in that court (54 Pac. Rep., 323) decided questions involving the Constitution of the United States, to wit, that portion of the fourteenth amendment to the Constitution of the United States which provides that "no
State shall deprive any person of life, liberty, or property
102 without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" (brief of plaintiff in error, pp. 9–14), and thereby another Federal question was clearly raised and submitted to this court (brief of plaintiff in error, pp. 15–31).

Further, upon the authorities submitted by plaintiff in error, ordinance No. 522 of the city of Kansas City, Kansas, is in violation of the fourteenth amendment to the Constitution of the United States (brief of plaintiff in error, pp. 15–31). It is admitted in the opinion handed down by this court that "at the time of the passage of the ordinance the street-railway cars of the Interstate Company were propelled by dummy locomotives using steam." It is also observed in the opinion that "if there had been no evidence offered in the case explanatory of the workings of the Interstate Rapid Transit Railway Company, it might be inferred from the face of the ordinance that the exception exempted from its penalties a railway similar to that operated by the plaintiff in error." The court concludes, however, from the evidence offered in explanation of the workings of the Interstate Rapid Transit Railway Company, that the exception made in section 8 of ordinance No. 522 is valid and constitutional and not in violation of the fourteenth amendment to the Constitution of the United States or any provision of that Constitution. It appears to us that the court has overlooked the evidence of Otto J. Morasch, one of the defendants in error, conclusively showing that the Interstate Rapid Transit railway was more dangerous than the railroad operated by Newman Erb as receiver (Record, 28).

The court must also have overlooked the evidence in the record showing that the Interstate road was not only operated by steam power at the time the ordinance was passed, but its track was constructed of a "T" rail of as heavy a weight as used generally
103 on any railroads, and that the "T" rail "in appearance is the same as used by the railroad operated by Newman Erb

as receiver" (R., 61, 62, 62). Therefore the court must have overlooked the authorities cited in the brief establishing that ordinance No. 522 was class legislation in violation of the fourteenth amendment to the Constitution of the United States. (See brief of plaintiff in error, pp. 15–31.)

The statement in the opinion handed down that "at the time of the accident the use of steam had been abandoned and electricity substituted as a motive power" has, in our view, no application whatever to the case at bar. The question before this court, as also before the other courts hearing this case, was whether ordinance No. 522 was constitutional or not when it passed the council, on September 26th, 1888, and when it was approved, September 27th, 1888. If at that time the Interstate Rapid Transit Railway Company was a railway similarly operated in Kansas City, Kansas, as the one operated by Newman Erb, as receiver and as a Federal official, then the ordinance was unconstitutional and void at the time of its passage and approval. Therefore the subsequent operation of the rapid-transit railway by electricity would not revive or resurrect an unconstitutional and void ordinance. A void ordinance cannot be cured by any act of the city council or any person interested therein.

After the Interstate Rapid Transit Railway Company had substituted electricity as a motive power, perhaps under some of the decisions a new ordinance valid in all respects might have been adopted in Kansas City, Kansas, regulating the speed of railroad cars and trains running through its limits, and excepting therefrom trains and cars operated by electricity. But no new ordinance was adopted after the substitution of electricity as a motive power by the rapid-transit railway company. Therefore it seems to us that the court overlooked the fact that ordinance No. 522 clearly
104 discriminated in favor of the Interstate Rapid Transit railway at the time the ordinance was adopted and published. If, as before stated, the ordinance was not valid when adopted and published it has never been of any force or effect.

Further, it appears from said ordinance that the trains and cars operated by Newman Erb, as receiver and as a Federal official, are discriminated against, because such ordinance attempts to control, in violation of the fourteenth amendment to the Constitution of the United States, the private grounds and right of way under the possession and control of Newman Erb, as receiver and as a Federal official (brief of plaintiff in error, pp. 40–45). Said ordinance No. 522 does not make proper exceptions of the private grounds of the railroad operated by Newman Erb, as receiver, and the trial court construed such ordinance as being applicable not merely to crossings and public grounds in the city, but also as to the private grounds and right of way in the possession and control of Newman Erb, as receiver (brief of plaintiff in error, pp. 30, 31, and cases there cited). Of course, in this State cities may adopt ordinances governing the speed of railroad engines and cars operated by steam, if such ordinances are reasonable and just, but in our opinion such ordinances are not valid or constitutional if they purport to "gov-

ern the speed of ordinary steam railroad engines and cars," and except therefrom the engines and cars of another railway or railroad also operated by steam, and which are more dangerous to the public and persons living near or travelling upon such roads than the ones attempted to be governed or controlled thereby.

For the reasons given and the authorities referred to above we think the court should favorably decide the Federal questions involved in the petition in error and in the record thereto attached, and should grant a rehearing in this case. This we respectfully pray.

WAGGENER, HORTON & ORR,

*Attorneys for Plaintiff in Error, Newman Erb, as Receiver of the United States Circuit Court in and for the District of Kansas of the Kansas City, Wyandotte & Northwestern Railroad Company.*

105 (Endorsed:) No. 11288. Supreme court. Newman Erb, receiver, &c., plaintiff in error, *v.* Otto J. Morasch and Eliza Morasch, &c., defendants in error. Petition for rehearing. Filed Feb. 25, 1899. Jno. Martin, clerk supreme court. Waggener, Horton & Orr, for plaintiff in error.

106 And be it further remembered that on the 1st day of March, 1899, the same being one of the regular judicial days of the supreme court of the State of Kansas, said court being in session at the court-room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston, and the Honorable William R. Smith, associate justices, the following proceeding was had and entered of record, to wit:

107 *Journal Entry Denying Petition for a Rehearing.*

NEWMAN ERB, Receiver, etc., Plaintiff in Error,
*vs.*
OTTO J. MORASCH ET AL., Defendants in Error. } No. 11288.

Now comes on for dicision the petition for a rehearing of this cause, and thereupon it is ordered that said petition be denied.

108 And be it further remembered that on the 7th day of March, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for a writ of error, which, with the endorsements thereon, is in words and figures as follows, to wit:

109 In the Supreme Court of the State of Kansas.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*v.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error.
} No. 11288

*Petition for Writ of Error.*

Now comes Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, plaintiff in error herein (being the receiver duly appointed on March 21st, 1890, by the circuit court of the United States in and for the district of Kansas of the said "The Kansas City, Wyandotte & Northwestern Railroad Company," including all of its railroad tracks, rights of way, and other property in the district of Kansas aforesaid, and the duly qualified and acting receiver, as aforesaid), and says that on or about the 11th day of February, 1899, this court rendered and entered an order and judgment herein in favor of the defendants in error, Otto J. Morasch and Eliza Morasch, as next of kin of Irene Morasch, deceased; and, further, that on or about the 2nd day of March, 1899, this court overruled and denied the petition of Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company aforesaid, for a rehearing, and that said order and judgment became final and are now final, in which final order and judgment aforesaid and the proceedings had prior thereto in said cause certain errors were committed, to the prejudice of this plaintiff in error, Newman Erb, as receiver of the Kansas City,
110 Wyandotte & Northwestern Railroad Company aforesaid, and to his prejudice as a receiver and officer of the circuit court of the United States for the district of Kansas; all of which will more in detail appear from the assignment of errors which is filed with this petition for a writ of error.

Wherefore this plaintiff in error, Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, duly appointed, qualified, and acting as such receiver aforesaid, prays that a writ of error may be allowed in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the records, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ALBERT H. HORTON,
B. P. WAGGENER,

*Attorneys for Newman Erb, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Appointed and Acting by the Circuit Court of the United States for the District of Kansas.*

111 [Endorsed:] No. 11288. No. 1. Supreme court. Newman Erb, as receiver, &c., *v.* Otto J. Morasch *et al.* Petition for writ of error. Filed Mar. 7, 1899. Jno. Martin, clerk supreme court. Waggener, Horton & Orr, for plaintiff in error.

112 Be it further remembered that on the 7th day of March, 1899, the same being one of the regular judicial days of the January, 1899, term of the supreme court of the State of Kansas, before the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, at his chambers, in the city of Topeka, the following proceeding was had and remains of record, to wit:

113 *Order Allowing Petition for Writ of Error.*

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*v.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error.

Upon this day comes the plaintiff in error, Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, and being the duly appointed, qualified, and acting receiver of the circuit court of the United States for the district of Kansas of said railroad company, and presents to the undersigned, chief justice of the supreme court of the State of Kansas, his petition herein, praying for the allowance of a writ of error in the above-entitled cause to the Supreme Court of the United States, for the correction of certain errors complained of and more fully set forth in the assignment of errors accompanying the said petition for a writ of error.

Upon consideration whereof it is hereby ordered that the said petition be, and the same is hereby, granted and the said writ of error allowed.

(Signed) FRANK DOSTER,
*Chief Justice of the Supreme Court of the State of Kansas.*

March 6th, 1899.

114 And also, on the same day, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error, which, with the allowance thereof and the endorsements thereon, is in words and figures as follows, to wit:

115 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, and also in the rendition of a final order and judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the

highest court of law or equity of the said State in which a decision could be had, in the said action and suit between Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, duly appointed, qualified, and acting under the authority as such receiver of the circuit court of the United States for the district of Kansas, plaintiff in error, and Otto J. Morasch and Eliza Morasch, as next of kin of Irene Morasch, deceased, defendants in error, wherein was drawn in question the rights and powers of said Newman Erb, as receiver, as aforesaid (he, the said Newman Erb, being then and there the duly appointed, qualified, and acting officer of the circuit court of the United States for the district of Kansas), and wherein there was drawn also in question ordinance No. 522 of Kansas City, Kansas, approved September 27th, 1888, and entitled "An ordinance to regulate the running of locomotives and cars in the city of Kansas City," which said ordinance purports to have been passed and adopted under an alleged statute of the State of Kansas, and also wherein was drawn in question an authority exercised under the United States and the decision was in favor of said ordinance and of said statute, which plaintiff in error contends are in violation of the fourteenth amendment to the Constitution of the United States, and wherein was drawn in question the construction of a clause of the Constitution of the United States and of an ordinance of Kansas City, Kansas, and a commission, power, and authority held under the United States and possessed by the said Newman Erb, as receiver, as aforesaid, and as an officer of the circuit court of the United States for the district of
116 Kansas, and the final order and decision aforesaid were against the title, right, privilege, power, and exemption specially set up and claimed under such clause of the Constitution of the United States and under the statutes of the United States, and commission, authority, and power exercised under the United States and under the Federal court of the United States, sitting in and for the district of Kansas, a manifest error hath happened, to the great damage of the said Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company aforesaid and as an officer of the circuit court of the United States for the district of Kansas aforesaid, as by his complaint as plaintiff in error appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the report and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on a day not exceeding thirty days from the 6th day of March, 1899, in the office of the clerk of the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court of the United States, this 6th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
*Clerk of the Circuit Court of the United States for the District of Kansas.*

Allowed by—
FRANK DOSTER,
*Chief Justice of the Supreme Court of the State of Kansas.*

117 [Endorsed:] No. 11288. No. 3. —— court. —— —— *v.* —— ——. Writ of error. Filed Mar. 7, 1899. Jno. Martin, clerk supreme court. Waggener, Horton & Orr, for —— ——.

118 And also, on the same day, there was filed in the office of the clerk of the supreme court of the State of Kansas an assignment of error, which, with the endorsements thereon, is in words and figures following, to wit:

119 In the Supreme Court of the United States, October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-eight.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*v.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error. } No. —.

*Assignment of Error.*

Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, duly appointed, qualified, and acting as such receiver and officer of the circuit court of the United States for the district of Kansas, plaintiff in error, in connection with his petition for writ of error, says that in the record and proceedings in said cause there is manifest error in the particulars following, to wit:

1. The supreme court of the State of Kansas erred in dismissing said case and thereby affirming the judgment of the said Kansas court of appeals, northern department, eastern division, and thereby affirming the judgment of the district court of Wyandotte county, State of Kansas, and in refusing to grant a rehearing on the petition of said plaintiff in error.

2. The said supreme court of the State of Kansas erred in refusing to give and grant in said cause the power, rights, and authority which the said Newman Erb, as receiver of the Kansas City, Wyan-

dotte & Northwestern Railroad Company and as an officer of
120 the circuit court of the United States for the district of Kansas, was authorized and empowered by said Federal court to possess, enjoy, and exercise; and the said supreme court of the State of Kansas erred in deciding, notwithstanding the provisions of the fourteenth amendment to the Constitution of the United States, that ordinance No. 522 of the city of Kansas City, entitled "An ordinance to regulate the running of locomotives and cars in the city of Kansas City," and approved September 27th, 1888, was valid and constitutional and not in conflict with said fourteenth amendment to the Constitution of the United States.

3. The supreme court of the State of Kansas by its decision herein annulled and destroyed the power and authority of the plaintiff in error, Newman Erb, as receiver, as aforesaid, duly appointed, qualified, and acting under the power and authority of the circuit court of the United States in and for the district of Kansas, which he was empowered to exercise as such Federal officer, as aforesaid.

4. The said supreme court of the State of Kansas erred in ruling and deciding in said case that ordinance No. 522 of Kansas City, Kansas, of the date of September 26, 1888, regulating the running of locomotives and cars in that city, is not obnoxious and contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

5. The said supreme court of the State of Kansas erred in ruling and deciding in said case that ordinance No. 522 of Kansas City of the date of September 26, 1888, regulating the running of locomotives and cars in that city, is not obnoxious or contrary to the constitutional provisions of the State in not having uniform operation because of the exemption made thereby in section 8, excepting from the provisions of said ordinance No. 522 the Interstate Rapid Transit Railway Company, running engines and cars by steam—a more dangerous railroad than that operated by plaintiff in error.

6. The said supreme court of the State of Kansas erred in not ruling and deciding that said ordinance No. 522 of Kansas City was invalid and void because of being class legislation and in
121 violation of that portion of the fourteenth amendment to the Constitution of the United States which ordains that "no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

7. The said supreme court of the State of Kansas erred in deciding that the contention of the plaintiff in error to the effect that his constitutional rights were violated was without foundation, and that the proceedings in error pending in said court should be dismissed.

8. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that a trespasser upon the track and private grounds of a railroad operated by a receiver appointed by the United States court in and for the district of Kansas is entitled to the same rights and protection as a person at a public crossing of such railroad.

9. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the parents of a little child which, without the notice or knowledge of the engineer, fireman, or other trainmen operating an engine and train of cars, accidentally came out from the weeds and upon the said track in front of the approaching engine and train, and in which case the engineer, fireman, and trainmen did everything in their power they could do to stop the train and prevent any accident or injury as soon as the infant was seen or known to be upon the track, are entitled to recover large pecuniary damages against the receiver of said railroad company under the charge and control of the United States circuit court for the district of Kansas because the little child was accidentally run over and killed after it had accidentally got in front of said engine and train.

10. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that "the application of the requirements of the said ordinance to the defendant's trains, under existing conditions, was not an unreasonable restraint upon the defendant or upon commerce, although the place where the killing occurred was within the suburbs of the city and not upon a highway or street crossing."

122 11. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that "the failure of the defendant to observe the provisions of the ordinance by running its train within the city at a speed of fifteen miles an hour was negligence of which the deceased could have legally complained had she survived the injury, although at the time she was upon the defendant's unfenced track, not at any street crossing, and without license of the company thereto."

12. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the district court of Wyandotte county did not commit error in receiving incompetent evidence in this case over the objections and subject to the exceptions of plaintiff in error.

13. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the district court of Wyandotte county did not commit error in refusing to give the instructions asked for by plaintiff in error.

14. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the district court of Wyandotte county did not commit material error in giving certain instructions, referred to in the record, over the objection and subject to the exceptions of plaintiff in error.

15. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the district court of Wyandotte county did not commit error in overruling the motion of plaintiff in error for judgment upon the special finding of the jury.

16. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the district

court of Wyandotte county did not commit error in overruling the motion of plaintiff in error for a new trial.

17. The said supreme court of the State of Kansas erred in dismissing said case and thereby affirming the judgment of the
123 district court of Wyandotte county in favor of the defendants in error and against the plaintiff in error.

18. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the verdict and judgment of the district court of Wyandotte county were sustained by sufficient evidence.

19. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the verdict and judgment rendered in the district court of Wyandotte county were not contrary to law.

20. The said supreme court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the decision and judgment of the said Kansas court of appeals of the northern department, eastern division, were not erroneous and contrary to law.

21. The said supreme court of the State of Kansas erred in dismissing said case and thereby affirming the decision and judgment of the Kansas court of appeals aforesaid in said cause.

22. The said supreme court of the State of Kansas by dismissing said case erred in not reversing the decision and judgment of the said Kansas court of appeals aforesaid.

23. The said supreme court of the State of Kansas erred in dismissing said case and thereby deciding against the contention of plaintiff in error, who claimed that his constitutional rights were violated by the decision and judgment of the district court of Wyandotte county, State of Kansas, and further violated by the Kansas court of appeals aforesaid.

24. The said supreme court of the State of Kansas erred in dismissing said case and in deciding that the contention of plaintiff in error, made in the Kansas court of appeals, was just and proper, and also in not deciding that the decision and judgment rendered herein by the Kansas court of appeals were proper and should be affirmed.

124 25. The said supreme court of the State of Kansas erred in not assuming and retaining jurisdiction of said case for all purposes necessary for a full and complete decision, and also erred in dismissing said case and rendering judgment against the plaintiff in error for all costs accrued in said supreme court, taxed at $11.00.

26. The said supreme court of the State of Kansas erred in rendering judgment against plaintiff in error for the full sum of $11.00, when said judgment should have been rendered against defendants in error.

And the said Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company and as a duly appointed, qualified, and acting receiver and officer of the circuit court of the United States for the district of Kansas, plaintiff in error, prays

that the said final order and judgment of the supreme court of the State of Kansas may be reversed, annulled, and altogether held for naught, and that the plaintiff in error, as such receiver and officer of the circuit court of the United States for the district of Kansas aforesaid, be restored to all things which he as such receiver and officer hath lost by occasion of such order and judgment, and for costs of suit.

B. P. WAGGENER &
ALBERT H. HORTON,
*Attorneys for Plaintiff in Error.*

125 [Endorsed:] No. 11288. No. 4. Supreme court. Newman Erb, as receiver, &c., *v.* Otto J. Morasch *et al.* Assignments of error. Filed Mar. 7, 1899. Jno. Martin, clerk supreme court. Waggener, Horton & Orr, for plaintiff in error.

126 And also, on the same day, there was issued from the office of the clerk of the supreme court of the State of Kansas a citation, which, with the return of the sheriff showing the service thereof and all endorsements thereon, is in the words and figures as follows, to wit:

127 UNITED STATES OF AMERICA, *ss:*

To Otto J. Morasch and Eliza Morasch, as next of kin of Irene Morasch, deceased, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Kansas, in a cause wherein Newman Erb, as receiver of the Kansas City, Wyandotte and Northwestern Railroad Company, is plaintiff in error and you and each of you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of March, A. D. 1899.

FRANK DOSTER,
*Chief Justice of the Supreme Court, State of Kansas.*

128 STATE OF KANSAS, } *ss:*
*Wyandotte County,* }

Received this citation March 15, 1899, and served the same in said county on the within-named Otto J. Morasch and Eliza Morasch and A. E. Watson, member of the law firm of McGrew, Watson and Watson, by delivering to each of them personally a true copy hereof March 15, 1899.

| | |
|---|---|
| Service | 1.00 |
| Copies | .75 |
| Mileage | 3.00 |
| Total | $4.75 |

J. W. LONGFELLOW, *Sheriff*,
By C. PATTERSON, *Deputy*,
*All of Wyandotte County, Kansas.*

[Endorsed:] Original, 11288. C. P. Newman Erb, receiver, *vs.* Otto J. Morasch. Citation. Filed Mar. 18, 1899. Jno. Martin, clerk supreme court.

129 In the Supreme Court of the State of Kansas.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*vs.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error.
} No. 11288

I, John Martin, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, true, and complete transcript of pleadings and papers filed and all proceedings had in the above-entitled cause as the same remains now on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office, in Topeka, this 28th day of March, 1899.

JNO. MARTIN,
*Clerk Supreme Court.*

130 In the Supreme Court of the State of Kansas.

NEWMAN ERB, Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*vs.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error.
} No. 11288.

Pursuant to a writ of error issued out of the United States circuit court for the district of Kansas, and directed to the supreme court of the State of Kansas, on the 7th day of March, 1899, and in obedience to the command thereof, I, John Martin, clerk of the said supreme court of the State of Kansas, do herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings of this court in the within-entitled cause, with all things concerning the same.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court, hereto affixed at my office, in Topeka, this 28th day of March, 1899.

JNO. MARTIN,
*Clerk Supreme Court.*

131 In the Supreme Court of the State of Kansas.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, Plaintiff in Error,
*v.*
OTTO J. MORASCH and ELIZA MORASCH, as Next of Kin of Irene Morasch, Deceased, Defendants in Error.
} No. —.

STATE OF KANSAS, *Shawnee County,* } *ss:*

Albert H. Horton, being first duly sworn, deposes and says that he is one of the counsel of Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, the plaintiff in error in the above cause, and that C. Patterson, who officially served, on March 15th, 1899, in Wyandotte county, State of Kansas, as deputy sheriff of said Wyandotte county, State of Kansas, the above and foregoing citation upon Otto J. Morasch and Eliza Morasch, defendants in error, and upon A. E. Watson, a member of the law firm of McGrew, Watson & Watson, was at said time and still is the duly qualified and acting deputy sheriff of said Wyandotte county and State of Kansas, having full authority under the laws of the State of Kansas to serve all legal processes issued from the supreme court of the State of Kansas; and affiant further says that the said law firm of McGrew, Watson & Watson, of which A. E. Watson is a member, were and are attorneys of record of defendants in error in the above and foregoing case in all of said courts named and referred to in said transcript; and further affiant saith not.

ALBERT H. HORTON.

Subscribed and sworn to before me this 31st day of March, A. D. 1899.

My commission expires Sept. 6th, 1899.

[Seal of D. H. Martin, Notary Public, Shawnee County, Kans.]

D. H. MARTIN,
*Notary Public.*

Endorsed on cover: File No., 17,349. Kansas supreme court. Term No., 249. Newman Erb, as receiver of the Kansas City, Wyandotte and Northwestern Railroad Company, plaintiff in error, *vs.* Otto J. Morasch and Eliza Morasch, as next of kin of Irene Morasch, deceased. Filed April 3rd, 1899.

No. 249.

SUPREME COURT U. S.
MAR 12 1900
JAMES H. MCKENNEY,
Clerk.

Brf. of Waggoner & Norton for

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Mar 12, 1900.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company,
*Plaintiff in Error,*
vs.
OTTO J. MORASCH and ELIZA MORASCH, as next of kin of IRENE MORASCH, deceased,
*Defendants in Error.*

No. 249.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

## BRIEF FOR PLAINTIFF IN ERROR.

B. P. WAGGENER and
ALBERT H. HORTON,
*Attorneys for Plaintiff in Error.*

Woodhouse & Schaser, Printers, Atchison, Kansas.

—IN THE—

# Supreme Court of the United States,

## OCTOBER TERM, 1899.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company,
*Plaintiff in Error,*
vs.
OTTO J. MORASCH and ELIZA MORASCH, as next of kin of IRENE MORASCH, deceased,
*Defendants in Error.*
No. 249.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

# BRIEF FOR PLAINTIFF IN ERROR.

## I.

## STATEMENT OF THE CASE.

On September 26th, 1888, the city council of Kansas City, Kansas, passed an ordinance, which reads as follows:

" ORDINANCE NO. 522.

An Ordinance to regulate the running of locomotives and cars in the City of Kansas City.

Be it ordained by the Mayor and Councilmen of the city of Kansas City :

SECTION 1. It shall be the duty of every engineer or other person engaged in running a locomotive to ring the bell attached to such locomotive, whenever the same shall be moving through the city.

SEC. 2. It shall be unlawful for any such engineer, conductor or other persons having a railway engine or train of cars in charge to permit same to be run along any track in said city at a greater speed than six miles an hour.

SEC. 3. It shall be unlawful for any locomotive to be run within this city in such a manner as to hinder or interfere with any funeral procession.

SEC. 4. It shall be unlawful for any person running or controling any locomotive to sound the whistle thereof or allow the same to be sounded within the corporate limits of this city except to prevent accidents that can not otherwise be arrested, and to start and stop the train.

SEC. 5. It shall be unlawful for any person running or controlling any locomotive to allow steam to escape from the cylinder cocks.

SEC. 6. It shall be unlawful for any engineer, conductor or other person managing or controlling any locomotive or train of cars to run the same backwards or cause to be so run in or through said city, without providing for a watchman or other person on rear end of such train in order to avoid accidents.

SEC. 7. Any person violating any of the foregoing sections, or the provisions of any of them therein contained, upon conviction before the police judge, shall be fined in the sum not exceeding one hundred dollars.

SEC. 8. The provisions of this ordinance shall not apply to the Inter-State Rapid Transit Railway Company, excepting with reference to funeral or other processions.

SEC. 9. This ordinance shall take effect and be in force from and after its publication in the Kansas Pioneer.

Passed in Council, September 26, 1888.

J. J. MOFFITT, City Clerk.

Approved September 27, 1888.

THOMAS F. HANNON, Mayor."

Record, 59.

This ordinance attempts to forbid "any engineer, conductor or other person having a railway engine or train of cars in charge, to run along any track in said city at a greater speed than six miles an hour."

Record, 59.

Section 8 thereof reads as follows:

"The provisions of this ordinance shall not apply to the Inter-State Rapid Transit Railway Company, except with reference to funeral or other processions."

Record, 59.

Kansas City, Kansas, is a city of the first class.

Vol. 1, Gen. Stat. of Kan. 1897, ch. 32, p. 337.

This action was originally brought in the District Court of Wyandotte county in the state of Kansas, on May 21st, 1895, by Otto J. and Eliza Morasch, the father and mother of Irene Morasch, to recover $6,000 as dam-

ages and costs against Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, for the death of Irene Morasch, an infant about 22 months old, caused, as alleged, by a train operated by the Receiver running upon and over the infant. The accident occurred about 10 o'clock, a. m., on June 16, 1893, between Seventeenth and Eighteenth Streets in the extreme western part of Kansas City, Kansas, a very thinly populated portion of that city.

Record, 9-11.

The petition filed in the said District Court of Wyandotte county by defendants in error, alleged, *inter alia:*

"Plaintiffs aver that the death of the said Irene Morasch was occasioned by reason of the recklessness, wantonness and negligence of the said defendant in the operation of said railroad engine and cars, and by reason of the recklessness, carelessness and wantonness of the servants of the said defendants in charge of said train and cars; that the said train of cars was being driven and run at a high and dangerous rate of speed at the time of said accident through and within the corporate limits of said city of Kansas City, contrary to the ordinances of said city in such case made and provided, and that the said plaintiffs have been damaged by reason of the matters and things herein alleged, in the sum of six thousand dollars."

Record, 11.

Otto J. and Eliza Morasch, the father and mother of Irene, prior to the time of the accident, lived in a house in Kansas City, Kansas, about 125 feet south of the railroad track. The railroad was north of their house. The accident happened on the railroad track back of the house of the defendants in error, and not far from the

lot on which the house was situated. The trains of the railroad passed to and fro every day frequently on the track back of the house of defendants in error.

Record, 19–20.

There was a rear door to the house of Otto J. and Eliza Morasch, and there were about three lots between the house and the path that led to Stewart Avenue, where the path ran from the avenue to the track, with high weeds on both sides.

Record, 22.

Back of the house, about 125 feet, the Kansas City, Wyandotte & Northwestern railroad was operated. The Inter-State Rapid Transit Railway operated its line about 100 feet in front of the house of Otto J. and Eliza Morasch.

Record, 28.

*Otto J. Morasch testified that this road was more dangerous than the Kansas City, Wyandotte & Northwestern railroad.*

Record, 28.

He testified, among other things:

"Q. So you had a train in front of you, and one at the rear?

A. Yes sir.

Q. Had you ever said anything to it, (the child), about going upon the railroad track?

A. No sir."

Record, 28.

"Q. It was on the private right of way of the company, wasn't it?

A. Well, I don't know whether that is a street going where that path is or not.

Q. I know, but there is no street crossing ?

A. There is no street crossing there.

Q. There has never been a street opened up there ?

A. No sir, not Eighteenth street is opened up.

Q. I mean a street running the way the track runs?

A. No ; there is no street opened up.

Q. There is no way to drive or walk ; there are deep cuts and high embankments there, are there not ?

A. Yes."

Record, 23.

William Richardson, the engineer of the train operated by Newman Erb as receiver of the railroad company, testified as a witness for the defendants in error, *inter alia*, as follows :

"Q. Was there any public crossings or public ground at this place where this accident happened ?

A. No sir ; the street ain't cut through there—Seventeenth street ain't cut through. Eighteenth street was probably 100 feet from there, west of there.

Q. This accident occurred on the private right of way of the company?

A. Yes sir."

Record, 37.

"Q. From which side of the track did this child come?

A. The left side.

Q. Now, how far do you say that child was from you when you first discovered the object ?

A. About six or seven rail-lengths, probably 150 or 160 feet when I first seen it.

Q. Where was the object then ?

A. Coming up the side of the track in the weeds; come out of the weeds. There are weeds about four feet from the tie; there are some weeds along the track; near the ties there were no weeds.

Q. How far was the object from the track, when you first saw it ?

A. About four or five feet.

Q. That was on the left hand side from you ?

A. Yes sir.

Q. Now, how near to that child was you when you first discovered it on the track ?

A. Well, about 70 or 80 feet, not quite three rail-lengths.

Q. When you first discovered it on the track ?

A. Yes sir, on the track.

Q. Now, at that time, what did you do ?

A. I put my air on, shut the engine off, and reversed her as quick as I could.

Q. Was there any thing else you could have done at that time to have stopped that train ?

A. No sir, I done everything I could.

Q. Was it possible to stop the train with the appliances then at hand, and prevent that collision ?

A. No sir; no way to prevent it.

Q. As you went up that road, did you keep a constant lookout for objects on the track ?

A. Yes sir.

Q. Were you in your proper place ?

A. Yes.

Q. Looking ahead ?

A. Yes sir.

Q. Where was the flreman ?

A. He was ringing the bell on his side.

Q. Was the whistle blown ?

A. Yes sir.

Q. For what distance was that bell rung from the time you started from the depot in the city up ?

A. Continually, all the time.

Q. Continuously through the city ?

A. Yes sir."

Record, 36-37.

The defendants in error upon the trial in said District Court of Wyandotte county, offered evidence tending to prove that the engineer of the train running over the infant Irene violated ordinance No. 522, regulating the running of locomotives and cars in Kansas City, by permitting the engine and train of cars in his charge to run from 12 to 15 miles per hour in passing through Kansas City.

Record, 35 ;

Record, 40.

The trial court charged the jury, *inter alia*, as follows :

"If the jury find from the evidence that the injuries

complained of, and which resulted in the death of the said Irene Morasch were caused within the corporate limits of the city of Kansas City, Kansas, and at the time there was an ordinance of said city prohibiting the running of trains within said city at a greater rate of speed than six miles an hour, and do further find that at said time the servants and employes of the defendant were running the train by which said injuries were occasioned at a much greater rate of speed than six miles an hour, and that while so running said train, ran upon and over the said Irene Morasch, by reason of which she was killed, such act of the persons in charge of said train is evidence of negligence on the part of said defendant, and if you further find that but for such speed of said train so running in excess of six miles an hour, said train could have been stopped by the engineer in charge thereof, after he saw the said child upon the track, or by the exercise of ordinary care and prudence could have seen her upon such track and before the engine would have reached her, then said defendant will be liable for the injuries so received, unless you further find that said plaintiffs were also negligent in permitting said child to be upon said railroad track at said time.

Given by the court. Defendant excepts."

Record, 76.

The jury answered, among other questions, the following:

"Q. 19. At said time were each the engineer and fireman in their proper place on said engine and looking ahead in the direction said engine was moving?

A. Yes.

Q. 20. At said time was the bell on the engine ringing, and had it been ringing continuously a long distance east of where said child was?

A. Yes."

Record, 80.

The jury found that the only reason the engineer and fireman failed to stop the train after they discovered the child on the track and just before the accident, was their failure to run the train "at a limited rate of speed."

Record, 80.

A verdict and judgment of $1,020.00 and costs were rendered December 19th, 1893, for defendants in error. Thereupon, proceedings in error to the Court of Appeals of the State of Kansas were taken, in accordance with the provisions of the statute of that state, and the judgment was affirmed on September 17th, 1898.

In the Court of Appeals, plaintiff in error asserted that Ordinance No. 522 was unconstitutional and void, as violative of the Fourteenth Amendment to the Constitution of the United States, which provides that "No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,"—because said ordinance arbitrarily excluded from its operation the Inter-State Rapid Transit Railway Company and all engineers and other persons operating the trains of such company in Kansas City, Kansas, and included the engineers and all other persons engaged in operating or running locomotives and trains of all other railroads.

Record, 59.

The Court of Appeals denied the right claimed, and decided, *inter alia* :

"It is further contended that the ordinance is obnoxious to the provisions of the Fourteenth Amendment to the Constitution of the United States. This contention cannot be sustained."

Record, 90.

Erb vs. Morasch, 54 Pac. Rep., 323.

In Kansas, the court of last resort is the Supreme Court. Section 1 of Article 3 of the Constitution of that State ordains that—

"The judicial power of this state shall be vested in a Supreme Court, District Courts, Probate Courts, Justices of the Peace, and such other courts inferior to the Supreme Court as may be provided by law; and all courts of record shall have a seal, to be used in the authentication of all process."

Vol. 1, Gen. Stat of Kan., 1897, p. 61.

Under the statutes of Kansas, proceedings in error may be taken from the judgment of the Court of Appeals to the Supreme Court of the state, in any case involving the Constitution, laws or treaties of the United States.

Sec. 31, Ch. 84, Vol. 2, Gen. Stat. of Kan., 1897, p. 37.

In accordance with the provisions of the statutes of Kansas, the plaintiff in error took the case on error from the Kansas Court of Appeals to the Supreme Court of the State of Kansas.

Record, 94–95.

In that court, plaintiff in error also contended that

the case involved the Constitution and laws of the United States, and asserted a claim and right founded upon the Constitution and laws of the United States. The Supreme Court of Kansas in that case denied the right claimed.

Record. 98–101.

Erb vs. Morasch, 60 Kan., 251.

That court held that ordinance No. 522 of Kansas City, Kansas, regulating the running of locomotives and cars in Kansas City, and excepting from its provisions the Inter-State Rapid Transit Railway Company, did not infringe upon the provisions of the Fourteenth Amendment to the Constitution of the United States, which provides that "No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Record, 100.

And further decided "that the said legislation (ordinance No. 522) enacted by the city council of Kansas City, Kansas, is not obnoxious to the provisions of the Fourteenth Amendment to the Constitution of the United States."

Record, 100-101.

Erb vs. Morasch, 60 Kan., 251-256.

It will therefore be noticed that the constitutionality

of ordinance No. 522 was directly raised in the Supreme Court of the State of Kansas, and that the right claimed by plaintiff in error founded upon the Fourteenth Amendment to the Constitution was denied.

II.

## Specification of the Errors Relied Upon.

Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, duly appointed, qualified and acting as such receiver and an officer of the circuit court of the United States for the district of Kansas, plaintiff in error, in connection with his petition for writ of error, says that in the record and proceedings in said cause there is manifest error in the particulars following, to-wit:

"1. The Supreme Court of the State of Kansas erred in

dismissing said case and thereby affirming the judgment of the Kansas court of appeals, northern department, eastern division, and thereby affirming the judgment of the district court of Wyandotte county, state of Kansas, and in refusing to grant a rehearing on the petition of said plaintiff in error.

2. The said supreme court of the State of Kansas erred in refusing to give and grant in said cause the power, rights and authority which the said Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company and as an officer of the circuit court of the United States for the district of Kansas, was authorized and empowered by said Federal court to possess, enjoy, and exercise; and the said supreme court of the state of Kansas erred in deciding, notwithstanding the provisions of the fourteenth amendment to the Constitution of the United States, that ordinance No. 522 of the city of Kansas City, entitled "An ordinance to regulate the running of locomotives and cars in the city of Kansas City," and approved September 27th, 1888, was valid and constitutional and not in conflict with said fourteenth amendment to the Constitution of the United States.

3. The Supreme Court of the State of Kansas by its decision herein annulled and destroyed the power and authority of the plaintiff in error, Newman Erb, as receiver, as aforesaid, duly appointed, qualified, and acting under the power and authority of the circuit court of the United

States in and for the district of Kansas, which he was empowered to exercise as such Federal officer, as aforesaid.

4. The said Supreme Court of the State of Kansas erred in ruling and deciding in said case that ordinance No. 522 of Kansas City, Kansas, of the date of September 26, 1888, regulating the running of locomotives and cars in that city, is not obnoxious and contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

5. The said Supreme Court of the State of Kansas erred in ruling and deciding in said case that ordinance No. 522 of Kansas City of the date of September 26, 1888, regulating the running of locomotives and cars in that city, is not obnoxious or contrary to the constitutional provisions of the State in not having uniform operation because of the exemption made thereby in section 8, excepting from the provisions of said ordinance No. 522 the Interstate Rapid Transit Railway Company, running engines and cars by steam—a more dangerous railroad than that operated by plaintiff in error.

6. The said Supreme Court of the State of Kansas erred in not ruling and deciding that said ordinance No. 522 of Kansas City was invalid and void because of being class legislation and in violation of that portion of the fourteenth amendment to the Constitution of the United States which ordains that "no state shall deprive any person of life, liberty or property without due process of

law, nor deny to any person within its jurisdiction the equal protection of the laws."

7. The said Supreme Court of the State of Kansas erred in deciding that the contention of the plaintiff in error to the effect that his constitutional rights were violated was without foundation, and that the proceedings in error pending in said court should be dismissed.

8. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that a trespasser upon the track and private grounds of a railroad operated by a receiver appointed by the United States court in and for the district of Kansas is entitled to the same rights and protection as a person at a public crossing of such railroad.

9. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the parents of a little child which, without the notice or knowledge of the engineer, fireman, or other trainmen operating an engine and train of cars, accidentally came out from the weeds and upon the said track in front of the approaching engine and train, and in which case the engineer, fireman, and trainman did everything in their power they could do to stop the train and prevent any accident or injury as soon as the infant was seen or known to be upon the track, are entitled to recover large pecuniary damages against the receiver of said railroad company under the charge and control of the United States Circuit Court for the District of Kan-

sas because the little child was accidentally run over and killed after it had accidentally got in front of said engine and train.

10. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that "the application of the requirements of the said ordinance to the defendant's trains, under existing conditions, was not an unreasonable restraint upon the defendant or upon commerce, although the place where the killing occurred was within the suburbs of the city and not upon a highway or street crossing."

11. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that "the failure of the defendant to observe the provisions of the ordinance by running its train within the city at a speed of fifteen miles an hour was negligence of which the deceased could have legally complained had she survived the injury, although at the time she was upon the defendant's unfenced track, not at any street crossing, and without license of the company thereto."

12. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit error in receiving incompetent evidence in this case over the objections and subject to the exceptions of plaintiff in error.

13. The said Supreme Court of the State of Kansas

erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit error in refusing to give the instructions asked for by plainliff in error.

14. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit material error in giving certain instructions, referred to in the record, over the objections and subject to the exceptions of plaintiff in error.

15. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit error in overruling the motion of plaintiff in error for judgment upon the special findings of the jury.

16. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit error in overruling the motion of plaintiff in error for a new trial.

17. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby affirming the judgment of the District Court of Wyandotte county in favor of the defendants in error and against the plaintiff in error.

18. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and de-

ciding that the verdict and judgment of the District Court of Wyandotte county were sustained by sufficient evidence.

19. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the verdict and judgment rendered in the District Court of Wyandotte county were not contrary to law.

20. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the decision and judgment of the said Kansas Court of Appeals of the Northern Department, Eastern Division, were not erroneous and contrary to law.

21. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby affirming the decision and judgment of the Kansas Court of Appeals aforesaid in said cause.

22. The said Supreme Court of the State of Kansas by dismissing said case erred in not reversing the decision and judgment of the said Kansas Court of Appeals aforesaid.

23. The said Supreme Court of the State of Kansas erred in dismissing said case, and thereby deciding against the contention of plaintiff in error, who claimed that his constitutional rights were violated by the decision and judgment of the District Court of Wyandotte county, State of Kansas, and further violated by the Kansas Court of Appeals aforesaid.

24. The said Supreme Court of the State of Kansas erred in dismissing said case, and in deciding that the contention of plaintiff in error, made in the Kansas Court of Appeals, was just and proper, and also in not deciding that the decision and judgment rendered herein by the Kansas Court of Appeals were proper and should be affirmed.

25. The said Supreme Court of the State of Kansas erred in not assuming and retaining jurisdiction of said case for all purposes necessary for a full and complete decision, and also erred in dismissing said case and rendering judgment against the plaintiff in error for all costs accrued in said Supreme Court, taxed at $11.00.

26. The said Supreme Court of the State of Kansas erred in rendering judgment against plaintiff in error for the full sum of $11.00, of costs, when said judgment should have been rendered against defendants in error.

And the said Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company and as a duly appointed, qualified, and acting receiver and officer of the Circuit Court of the United States for the District of Kansas, plaintiff in error, prays that the said final order and judgment of the Supreme Court of the State of Kansas may be reversed, annulled, and altogether held for naught, and that the plaintiff in error as such receiver and officer of the Circuit Court of the United States for the District of Kansas aforesaid, be restored to all things which he as such receiver and officer hath lost by occasion of such order and judgment, and for costs of suit."

Record, 108–112.

III.

## ARGUMENT.

### Ordinance No. 522 of the City of Kansas City, Kansas, Regulating the Running of Locomotives and Cars in the City of Kansas City, is Unconstitutional and Void, for the Reason that It Arbitrarily Excludes from Its Operation the Inter-State Rapid Transit Railway and the Engineers and Other Persons Having Charge of the Engines or Trains of that Company, and Includes All Other Railroad Companies and the Engineers and All Other Persons Having Control of the Engines or Trains Thereof.

We contend that Ordinance No. 522, of the city of Kansas City, Kansas, passed September 26th, 1888, is vitiated by the exception found in Section 8 thereof, which reads as follows :

"The provisions of this ordinance shall not apply to the Inter-State Rapid Transit Railway Company, excepting with reference to funeral or other processions."

Record, 59.

This provision of the ordinance means that the

Inter-State Rapid Transit Railway Company shall not be subject to its provisions, "excepting with reference to funeral or other processions."

Record, 59.

The evidence contained in the Record shows that at the time of the passage of Ordinance No. 522, the cars of the Inter-State Rapid Transit Railway Company were propelled in Kansas City, Kansas, by locomotives using steam.

W. S. Carroll, a witness for defendants in error, testified upon the trial concerning the Inter-State Rapid Transit Railway Company, as follows:

"Q. How long have you known of the operation of what has always been publicly known as the Elevated railroad, formerly the Inter-State Rapid Transit Railway Company?

A. Since its operation in the city. I would have to study to find out when it was started first. I have known it since it was originally operated in the city.

Q. Well, how many years has that been?

A. Seven or eight years, I should judge.

Q. Have you seen it in operation daily?

A. Almost.

* * * * * * *

Q. What kind of motive power was used by this company in June, 1888, and since that?

A. Steam motive power, if I recollect rightly."

Record, 52-53.

Otto J. Morasch, one of the defendants in error, in his testimony, referred to the Inter-State Rapid Transit Railway Company as the "dummy line."

Record, 28.

It was in front of his house about 100 feet. He said the line "was more dangerous than that," referring to the road operated by Newman Erb as receiver.

Record, 28.

W. H. H. Freeman, for the defendants in error, testified:

"Q. Well, is there much more danger from the ordinary locomotive to a person on the track than one of those dummy engines, if they do not get out of the way?

A. No; I think the dummy is as dangerous as the other.

Q. What is that?

A. I think the dummy is fully as dangerous as the other.

* * * * * * *

Q. Now, you say you think those dummies were about as dangerous as the ordinary railroad locomotive; you mean if they could run as fast?

A. No I don't. They didn't make as much noise; they crept up onto you, and more accidents happened by them."

Record, 56-58.

As above stated, it appears from the evidence that when ordinance No. 522 was passed, the Inter-State

Rapid Transit Railway Company operated its engines with steam. That road runs around Kansas City, carrying passengers to different parts of the city, starting in Kansas City, Missouri, and going out to Chelsea Park and to Edgarton, in Kansas.

Record, 57.

It is about three miles in length. When ordinance No. 522 was passed, the Inter-State Rapid Transit Railway Company had dummy engines, propelled by steam. Later, it adopted electricity. Ordinance No. 522, on account of the exception contained in section 8 thereof, exempting the Inter-State Rapid Transit Railway Company from its provisions, denied to Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, the equal protection of the laws in Kansas City, Kansas, and also forbid him as such receiver the enjoyment of the property under his control in the manner permitted to the Inter-State Rapid Transit Railway Company, and thereby deprived him of liberty in particulars of primary importance to his business, and also in his pursuit of his rights and privileges.

It was said by this court, speaking through Mr. Justice Brewer, in the case of Gulf & C. R. Co. v. Ellis, 165 U. S. 155:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from the States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a gen-

eral proposition, this is undeniably true, * * * * yet it is equally true that such classification cannot be made arbitrarily. * * * * Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

In Vanzant v. Waddell, 2 Yerger 260, 270, Catron J. (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared: "Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law by another."

In Dibrell v. Morris' Heirs, Supreme Court of Tennessee, 15 S. W. Rep. 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words:

"We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural, and not arbitrary."

Cooley's Const. Lim. 393.

The Fourteenth Amendment "suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others."

*Ex Parte* Virginia, 100 U. S., 339;

Santa Clara County v. So. Pac. R. Co., 18 Fed. Rep. 385;

Wally's Heirs v. Kennedy, 2 Yerg., 554;

Bank v. Okely, 4 Wheat., 235;

State v. Loomis, 105 Mo., 307;

County of Santa Clara v. Rld. Co., 18 Fed. Rep., 398;

Darling v. Rogers, 7 Kan., 592.

In that case, the Herd Law act referred to, exempted six counties from the provisions of the general fence law, for five years. This was held unconstitutional and void on account of such exemption.

In Robinson v. Gray, 17 Kan., 248, the statute referred to related to sheep running at large. It exempted from its provisions Doniphan county. Therefore, the act was held unconstitutional and void.

See also—

Gray v. Crockett, 30 Kan., 138–143.

*It appears from the evidence of Otto J. Morasch, the father, that the dummy line (referring to the Inter-State*

*Rapid Transit Railway) was more dangerous than the railroad operated by the Receiver.*

Record, 28.

See—

Record, 56–58.

It also appears from the other evidence that the Inter-State Road was operated by steam motive power at the time the ordinance was passed; that the track is constructed of a "T" rail of as heavy a weight as is used generally on any of the railroads; and that the "T" rail in appearance is the same as used by the railroad operated by the defendant below.

The ordinance is class legislation. It expressly excepts from its provisions one railroad company, except as to funeral or other processions.

The fact that one railroad was excepted from the provisions of the ordinance indicates clearly that the city council was of the opinion that that road would have been included in its terms and subject to its operation, had it not been for the exception. The trains of the Inter-State road can be run at the rate of 25 miles per hour through the most crowded portions of the city, but the trains of all other railroad companies, regardless of their kind or nature, must be limited to 6 miles per hour. As respects funeral and other processions, the Inter-State road is upon no better footing than other railroad companies operating in the city.

This ordinance makes it unlawful for any person running or controlling any locomotive to permit steam to escape from the cylinder-cocks. This, however, is not applicable to persons operating or controlling locomotives of the Inter-State road; they can permit steam to escape from the cylinder-cocks whenever and wherever they please, without being amenable to the law.

It makes it unlawful for a person running a locomotive belonging to any other company than the Inter-State, to sound the whistle or allow the same to be sounded within the corporate limits of the city, except to prevent accidents and to start and stop trains, but a person running a locomotive on the Inter State road can sound the whistle as loud and as long as he pleases, on the busiest thoroughfares of the city, at any time of the day or night, without being amenable to the law.

It is made unlawful by this ordinance for any engineer, conductor or other person running a train of cars in the city, to run the same backwards without providing for a watchman on the rear end of the train. The Inter-State company is exempt from the operation of this provision of the ordinance. A train can be backed on that road at any place within the limits of the city at any rate of speed, without any watchman being stationed at the rear end of the train.

No good reason can be given why the rate of speed of the Inter-State trains should not be limited the same as that of all other trains. There is just as much danger

arising from the operation of those trains as of the trains of any other railroad company. As before stated, one of the plaintiffs testified that the Inter-State road was the "more dangerous one."

Record, 28.

They cannot be stopped with any greater facility or in any shorter space than the trains of other companies can be stopped. The inconvenience arising from the escaping steam is just as great whether it escapes from the cylinder-cocks of locomotives on the Inter-State road, or locomotives upon some other road. It is just as dangerous to back trains upon the Inter-State road without a watchman upon the rear end as it is to back trains upon any other railroad without a watchman.

Furthermore, in the course of time, there may be constructed and operated within the limits of the city, a dozen different lines operated exactly as the Inter-State road was operated at the time this ordinance was passed. For aught that appears in the testimony, there may have been a number of other railroads of a similar nature to the Inter-State road within the limits of Kansas City, Kansas, at the time this case was tried and the time the ordinance was passed. Yet the ordinance would apply to all such roads, and would except the Inter State road only.

*The ordinance does not except from its provisions all roads operated with dummy locomotives or operated as the*

*Inter-State road was operated. It excepts that particular road, and no other, and it excepts it by name.*

In Gillette v. Topeka, 32 Kan., 431, it was decided "that an act of the legislature may be special where it applies to any particular and existing persons or things, as well as where it applies to one only," and in that case the act was held unconstitutional and void.

For the same reason and for other reasons hereinafter stated, said ordinance No. 522 must be held unconstitutional and void.

A statute would be unconstitutional which selects particular individuals from a class or locality and subjects them to peculiar rules or imposes upon them special obligations or burdens, from which others in the same locality or class are exempt.

Railway Co. v. Ellis, *supra;*

Gillette v. Topeka, *supra;*

Cooley's Cons. Lim., 6th Ed., 479, 482, 483 and notes.

See, also, the following cases where acts of Legislatures have been held unconstitutional as class legislation:

Wages Law of Missouri of 1885, applying to manufacturers, and mine-owners. (State v. Loomis, 115 Mo., 307.)

State v. Goodwill, 33 W. Va., 179.

The Eight-Hour law of Nebraska, of 1891, excluding

farm hands, (Low v. Printing Company, 41 Neb., 127).

Same ruling as to the Eight-Hour law of Colorado, of 1895, concerning special industries. (*In re* Eight Hour law, 39 Pac. Rep., 228.)

Mining law of Illinois, of 1883 and 1885, as to weighing scales, etc. (Millette v. People, 117 Ill., 294.)

State v. Sheriff, 48 Minn., 236.

Law of California, of 1893, relating to the classification of cities. (Darcy v. Mayor, 38 Pac. Rep., 500.)

An Act of Ohio, of 1888, applying to a city. (City of Cincinnati v. Steinscamp, 43 N. E., 490.)

*City ordinance relating to Sunday law excluding Jews.* (*City of Shreveport v. Levy, 26 La. Ann., 671.*)

The following cases follow the decision of the Supreme Court of Kansas in Gillette v. Topeka, 32 Kan., 431:

State v. Simon, 22 Atl., Rep., 120;

State v. Hammer, 42 N. J., Law., 435;

State v. Smith, 26 N. E. Rep., 1069;

Harding v. People, 160 Ill., 459;

Walley's Heirs v. Kennedy, 2 Yerg., 554;

Lewis v. Webb, 3 Me., 326;

Holden v. James, 11 Mass., 396;

Piquet, Etc., 5 Pick., 65;

Nichols v. Walter, 37 Minn., 264;

State v. Coal Co. (W. Va.), 10 S. E., 288;

Braceville Coal Co. v. People, (Ill.), 35 N. E., 62;

County of Santa Clara v. Southern Pacific Ry. Co., 18 Fed., 385;

Darling v. Rogers, *supra;*

Robinson v. Perry, *supra;*

Mo. Pac. Ry. Co. v. Mackey, 127 U. S., 205.

That corporations are "persons" within contemplation of the constitutional provision, see:

Railway v. Ellis, *supra.*

Mo. Pac. Ry. Co. v. Mackey, 127 U. S., 209.

Santa Clara Co. v. So. Pac. Ry. Co., 118 U. S., 394.

That municipal corporations are bound by these constitutional provisions, see:

Gen. Statutes for 1889, par. 555;

Cooley's Const. Lim., 198.

That the clause excepting the Inter-State road cannot be disregarded and the balance of the ordinance held good, see:

C. B. U. P. Rld. Co. v. A. T. & S. F. Rld. Co., 28 Kans., 453;

Fletcher v. Peck, 6 Cranch, 87;

Calder v. Bull, 3 Dall., 386;

Booth v. Woodbury, 32 Conn., 118;

Lin Sing v. Washburn, 20 Cal., 534;

Holden v. James, 11 Mass., 396;

Davidson v. Johonnot, 7 Metc., (Mass.) 396;

Bull v. Conroe, 13 Wis., 233;

Walley's Heirs v. Kennedy, 2 Yerg., (Tenn.) 554;

The King v. Pease, 1 Nev. & M., 690;

4 Barn. & Adol., 30;

Vaughan v. Taff Vail Rly. Co., 5 H. & N., 678;

Cleveland & Pittsburgh Rld. Co. v. Speer, 56 Pa. St., 325;

Clark v. Mayor, Etc.. of Syracuse, 13 Barb., (N. Y.) 32.

The questions with reference to the constitutionality of this ordinance were raised in various ways: By objection to the introduction of the ordinance "as incompetent, irrelevant, immaterial and not properly set up in the petition;" because the ordinance was void upon its face for the reason that it excepts the Inter-State Rapid Transit Railway Company from the operation thereof; because the ordinance only fixes a penalty upon the engineer, who should violate it, and fixes no penalty upon the railroad company using or operating the engine; and because the ordinance should be held invalid as to that portion of the city where the accident occurred, as it would be a restraint upon trade and commerce to en-

force the same in accordance with the provisions thereof; by excepting to instruction No. 4 of the court, with reference to it; by a motion for a judgment in the case, and by a motion for a new trial.

If ordinance No. 522 be eliminated from this case, then, under the petition and the findings, the plaintiffs below are not entitled to any recovery.

The validity of the ordinance must be decided of the date of its passage, to-wit: September 26th, 1888. It must be considered with the conditions then existing. Any subsequent change in the operation of the Inter-State road is wholly immaterial and irrelevant.

In the case of Pennsylvania Company v. Frana, 13 Ill. App., 91, it is decided "that the validity of an ordinance of a city stands on the same footing as a statute. Therefore it is error to leave it to the jury to determine the applicability of an ordinance relating to the running of trains on the streets to circumstances and its legal effect. It presents a question of law." Ordinance No. 522 was valid when it was passed, on September 26th, 1888, or it was then wholly unconstitutional and void. Subsequent circumstances could not render it valid.

Evidence was received to show that in June, 1893, the Elevated Railroad used electricity as a motive power.

That was wholly immaterial to all the issues of this case, and incompetent. The city ordinance of 1888 could not be affected by any subsequent change of motive power, and therefore what motive power the Elevated

Railroad, or any other road, used in 1893, was wholly immaterial, but prejudicial to the plaintiff in error.

The case of Railroad Company v. Richmond, 96 U. S., 521, is not applicable. In that case, "the ordinance, while apparently limited in its operation, was in effect general, as it applied to all who could do what was prohibited." When the railroad company in that case desired to run its trains through the street of Richmond referred to in the decision, a request was made by the company of the city to approve its location. This the city was willing to do upon condition, however, that it would not part with its control of the particular railroad making the request. By the conditions imposed upon the railroad company by the city in approving its location, the city reserved certain powers of control, and under such reservation the ordinance in that case was held valid.

Again, in that case, no other person or corporation had any right to run locomotives on Broad street excepting the Richmond, Fredericksburg & Potomac Railroad Company. On this account, the ordinance construed in that case applied to all who could do what was prohibited. The facts in this case are very different from that. We therefore earnestly insist that Ordinance No. 522 discriminates between the Inter-State Railway Company and the other railroad companies operating in Kansas City, Kansas, and thereby infringes the provision of the Constitution of the United States which guarantees to all persons the equal protection of the laws.

IV.

## Under the Construction Given to Ordinance No. 522 by the Supreme Court of the State of Kansas, Newman Erb, as Receiver of the Federal Court, Exercising Authority Under the United States, is Erroneously Made Liable to a Third Party Upon an Ordinance of the City of Kansas City, Kansas, Regulating the Speed of Railroad Trains.

It appears from the record that Newman Erb was appointed on March 21st, 1890, by the United States Circuit Court in and for the District of Kansas, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company.

Record, 10.

The accident whereby Irene Morasch lost her life occurred on June 16th, 1893, while Erb was receiver, operating the Kansas City, Wyandotte & Northwestern Railroad Company, under the authority of the Circuit Court of the United States for the District of Kansas. The damages recovered in the trial court were wholly based upon the ground that the receiver of the railroad company violated the provisions of said Ordinance No. 522, regulating the running of locomotives and cars in Kansas City, Kansas. We insist that the defendants in error could not found an action against Erb as receiver upon said Ordinance No. 522.

In the case of Sanders v. Southern Electric Railway Co., 147 Mo., 411, (1898) in which the petition charged an electric railway company with negligence in the violation of an ordinance requiring the motorman to "keep a vigilant watch for all vehicles on the track or moving toward it, and on the first appearance of danger to such vehicle, to stop the car in the shortest time and space possible," the court held that this was not a statement of the cause of action, and the judge delivering the opinion says:

"The legislature may delegate a part of the police power of the state to a municipality, but it cannot delegate the legislative functions of making laws that will be binding upon citizens between themselves in civil proceedings. The police regulations control the citizen in respect to his relations to the city, representing the public at large, and for this reason are enforcible by fine and imprisonment, but laws controlling the liability of citizens *inter sese* must eminate from the legislature, in whom, alone, such power is vested by the Constitution."

This case is referred to in Byington v. R. R. Co., 678 of same volume, (1899), which was an appeal from an order granting defendant a new trial, and, in affirming the action of the lower court in ordering such new trial, the judge delivering the opinion of the court says:

"It is not affirmed, however, for the reason stated by the Circuit Court in granting a new trial, that the injury complained of is the direct result of the violation of the said ordinance, but because of the fact that the City of St. Louis has no power to prescribe by ordinance a rule of conduct that will afford the basis of civil liability from one citizen to another, and because, while it has authority, under its delegated police power, to adopt police regulations, and to punish their infraction by fine and imprisonment, such regulations cannot confer a civil right of action upon one person against another.

It makes no difference, therefore, whether the 'injury is the direct result of a violation of' a municipal ordinance or not, for such ordinance can neither be the corner stone of liability nor evidence of common law negligence. These principles of law are as old as the law itself, and have been pointed out and enforced in this state and in other states on many occasions prior to the decision in Sanders case."

Citing, Norton v. St. Louis, 97 Mo., 537.

In an earlier case, Fath v. Tower Grove & La Fayette Rly. Co., 105 Mo., 537, (1891), Judge Sherwood, for the court, says:

"Proceeding, then, to inquire into the validity of the ordinance, it may be admitted at the outset that it is beyond the power of a municipal corporation by its legislative action directly to create a civil duty enforcible at common

law,' for this is an exercise of the power of sovereignty belonging alone to the State."

In the case of Sanders v. Railway Co., *supra*, Judge Marshall, referring to the averment in the petition, that "the defendant in consideration of the grant of the City of St. Louis, of its franchise to operate its railway and cars as aforesaid, undertook and agreed to obey the provisions of said ordinance aforesaid, and the defendant, at said time, had taken out a license from the City of St. Louis to operate said cars," says:

"This allegation was necessary to the statement of the cause of action predicated upon the ordinance. It required the ordinance and the contract both to constitute a cause of action. This precise ordinance regulation underwent adjudication by this court in Fath v. T. G. & L. R. R. Co., 105 Mo., 537. * * * * * The agreement of the defendant to comply with the ordinance provisions in question was held to create a contractual liability on the part of the defendant which did not exist at common law, and without which the city was without power to bind the defendant. The conclusion reached in that case was approved in Senn v. Southern Ry. Co., 108 Mo., 9, 152. The petition stated a cause of action, but the proof failed to make out the *prima facie* case. * * * * The mere fact that the defendant was operating street cars upon the streets of the city, does not establish the allegation that it does so under a grant or license of the city, *non constat* it may have acquired the right from the State prior to the adoption of the Constitution of 1875; nor that the city in consideration of the grant required the defendant to so agree; nor that the defendant has so agreed. The contention that the city has the right, under its police power to adopt the ordinance, is not tenable."

In the case of Murphy v. Lindell Ry. Co., 54 S. W.

Rep., 442, (1899), Judge Brace, delivering the opinion of the court, says:

"* * * * We have twice, and quite recently, held before this in regard to this identical ordinance, that, as it creates a new and different standard for measuring the liability of citizens in this state in the City of St. Louis from that prescribed by the 'law of the land,' it could be enforced only against those who accepted its provisions for a consideration,"

and quotes from Sanders v. Rly. Co., *supra*,

"Though the ordinance was allowed to go in evidence without objection, that, alone, would not make out a case of legal liability. It required proof of the allegation that the defendant agreed to be bound by it."

The Judge further says:

"In the former case, (Fath v. Ry. Co., 105 Mo., 537), it was admitted in the opinion that it is beyond the power of a municipal corporation, by its legislative action, directly to create a civil duty enforcible at common law, for this is an exercise of power of sovereignty of the State; but it was held that such a liability might be created by a contract between the defendant and the city by which the former, in consideration of the franchise granted by the city of laying its tracks on the street, agreed to yield obedience to the ordinance. These cases are decisive of the one in hand. As the instructions given for the plaintiff authorized a recovery upon proof of a breach of the ordinance without any proof of the acceptance of its provisions by the defendant, there was fatal error in giving them. Although the plaintiff, doubtless upon the faith of one of those cases, framed the issue which he tendered, alleging such acceptance, yet, having failed to prove it, he now asks that those cases be overruled, and the doctrine of these instructions

be established as the law of this court. This demand could not be granted upon the ground of any different ruling upon this ordinance in other cases, for, as was said in the *Fath* case, although the ordinance has been in existence for over thirty years, its legal validity has never been adjudicated by this court, though incidentally touched upon in several instances."

Referring to the point made by counsel for the plaintiff, that the validity of the ordinances, as affording causes of action, has been frequently recognized by the court heretofore, the Judge, continuing, says :

"That it is not the point in question here,—it is not the validity of the ordinance, but its effect upon the rights of the defendant in a civil action."

In this case, there was no evidence offered or admitted showing or tending to show that neither Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, nor the Kansas City, Wyandotte & Northwestern Railroad Co. accepted ordinance No. 522 as a condition or as a consideration for the granting any franchise or permission to operate the road in the city of Kansas City. Ordinance No. 522 was not only offered as evidence of the negligence of plaintiff in error, but as the corner stone of his liability as receiver. All of this was erroneous.

We therefore insist that said ordinance was erroneously received as evidence by the trial court, and that it was not binding in any way upon the plaintiff in error. The ordinance ought not to have been considered as

affecting the rights of plaintiff in error by the Supreme Court of Kansas. We therefore contend that the judgment of that court must be reversed.

Respectfully submitted,

B. P. WAGGENER and
ALBERT H. HORTON,
*Attorneys for Newman Erb, as Receiver, Plaintiff in Error.*

March 8th, 1900.

No. 249.

FILED
APR 30 1900
JAMES H. McKENNEY,
Clerk

Brief of Horton & Waggener for

—IN THE—

# Supreme Court of the United States,

## OCTOBER TERM, 1899.

Filed April 30, 1900.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company,

*Plaintiff in Error,*

vs.

OTTO J. MORASCH and ELIZA MORASCH, as next of kin of IRENE MORASCH, deceased,

*Defendants in Error.*

No. 249.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

## Brief of Plaintiff in Error in Reply to Brief Filed by Defendants in Error.

ALBERT H. HORTON,
B. P. WAGGENER,
*Attorneys for Plaintiff in Error.*

Woodhouse & Schauer, Printers, Atchison, Kansas.

—IN THE—

# Supreme Court of the United States,

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NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company,
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vs.
OTTO J. MORASCH and ELIZA MORASCH, as next of kin of IRENE MORASCH, deceased,
*Defendants in Error.*

No. 249.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

## Brief of Plaintiff in Error in Reply to Brief Filed by Defendants in Error.

It is stated in brief of defendants in error, page 12, that :

"It will not be contended by opposing counsel but that the city had power under legislative authority to enact police regulations to govern the speed of trains within its corporate limits."

"Some surprise may justly be manifested at the position taken in the brief."

It is provided by Section 1, Article 2, of the Constitution of the State of Kansas, that:

"The legislative power of this state shall be vested in a house of representatives and senate."

And it is also provided by Section 5, Article 12, of the Constitution of the State of Kansas, that:

"Provisions shall be made by general law for the organization of cities, towns and villages, etc.; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit shall be so restricted as to prevent the abuse of such power."

There is no clause or provision in the constitution authorizing the legislature to delegate any of the legislative power vested in it by Section 1, Article 2, of the constitution, cited *supra*.

The ordinance in question was enacted in pursuance of the twenty-first sub-division of Section 11, Article 3 of Chapter 18 of "An Act to incorporate and regulate cities of the first class, and to repeal all prior acts relating thereto," General Statutes of Kansas, 1899, page 161.

Our contention is:

*First.* That the passage of the ordinance in question was the exercise, by the city council of Kansas City, Kansas, of a legislative power, which, by Section 1, Article 2, of the constitution, is vested exclusively in the house of representatives and senate of the State of Kansas, and that notwithstanding the provision of the

charter of cities of the first class, to which attention has been called, the legislature did not have constitutional power to delegate to the mayor and council the power of legislating, with reference to the subject matter of the ordinance.

*Second.* If, however, we are mistaken in this, and it shall be held that the passage of the ordinance was the proper exercise of delegated power on the part of the mayor and council of the City of Kansas City, Kansas, then we insist that it is solely a police regulation, and cannot be made either the basis of a cause of action for damages, or a rule of evidence in an action based upon a common law right. In addition to the authorities referred to in original brief, to which reference is made, we invite the attention of the court to the following, namely:

In the case of Jenks vs. Williams, 115 Mass., 217, it was held, that:

"The ordinance of the City of Boston of 1850, imposing penalties for making and maintaining bow-windows or other projections into the streets of Boston, are intended for the benefit of the public, and do not confer distinct rights on individual citizens or owners of property."

In the case of Flynn vs. Canton Co., 40 Md., 312, the action was grounded on the neglect of the appellees to comply with an ordinance of the city, which made it the duty of the owners or occupiers of property to clear away snow and ice from the pavements or sidewalks

contiguous to their premises, under a penalty of two dollars for every neglect, besides the expense of clearing the same away under the direction of police officers, in the mode provided in the ordinance, it was *held*:

"That the action would not lie; that the neglect of the defendants to perform the duty or service imposed on them by the ordinance, did not render them liable to a private action; that the only liability resting upon them was that imposed by the ordinance itself, namely; the prescribed fine or penalty for each neglect, and the cost of removal in every instance of their refusal or neglect."

The action of the plaintiff was either a common law action, or based upon the violation of the provisions of the ordinance, for there is no statute of the State of Kansas providing for such an action. If the action was not based upon the ordinance, the defendant company was liable for the injury or not, irrespective of the ordinance. Counsel in their brief contend that the ordidance was "merely evidence of negligence." In other words, that the city council had the power to pass an ordinance fixing a rule of evidence to determine the question of liability or non-liability in a common law action for negligence. Let us suppose that if there had been no ordinance that no common law action would lie; would disobedience to the regulations of this ordinance, of itself, subject the company to an action? This question would seem almost to answer itself, for if it be affirmed then may civil duties and civil remedies be given or taken away by ordinance; a power as yet quite beyond the reach of municipal legislation. The national or state legisla-

ture may do this, for it is the supreme power, and as such can make that immoral which was before indifferent, and that neglect which was before prudence; but the city of Kansas City, Kansas, had no such power. Its ordinances are but police regulations, enforceable by penalties, recoverable by actions of debt or otherwise as may be prescribed, but if not so enforced they come to nothing. An ordinance may forbid an assault and battery, yet if A unlawfully assaults B, and B brings an action at common law to recover damages for such unlawful assault, would the ordinance prohibiting assault be competent evidence in favor of B on the trial of such common law action?

In the case of Vandyke vs. Cincinnati, Disney (Ohio Report), 532, the court, considering a similar question, said:

"I conclude then, that the ordinance imposed upon Harrison a public duty alone, which can only be enforced by the penalty prescribed and non-performance of which does not subject him to a civil action at the suit of a person injured."

In the case of Heeney vs. Sprague, 11 R. I., 456, it was held, that:

"A violation of a duty imposed by a municipal ordinance, and sustained by a fine, will not support an action on the case for special damages in favor of one injured by the violation and against the violator."

Hickok vs. Trustee, 16 N. Y., 161;

Eastman vs. Meredith, 36 N. H., 284.

Section 7 of the ordinance provides, that :

"Any person violating any of the foregoing sections, or the provisions of any of them therein contained, upon conviction before the police judge, shall be fined in the sum not exceeding one hundred dollars."

The court below, by construction, places in the ordinance another penalty or burden, namely, that if any engineer of any railway company shall violate any of the provisions of this ordinance, then and in that event his violation of the ordinance shall be evidence of negligence on the part of the company, which may be used in an action at common law to recover damages sustained in consequence thereof. If the city council has the right to prescribe what shall constitute a rule of evidence, may it not also provide by ordinance, in the nature of penalty or fine for its violation, that any party injured as a result thereof may have an action against the violator of the ordinances? In a case, and under circumstances where there would be no action at common law, can the legislature, under a constitutional provision like the one to which the attention of the court has been called, delegate to a municipal body any such power or authority, and if it has in terms attempted to delegate such power or authority, would ordinances passed in pursuance of such delegated power, prescribing rights and providing remedies, afford that due process of law guaranteed by the constitution of the United States ?

In the case of Saunders vs. Southern Electric Ry.

Co., 147 Mo., 411, it was said by the court:

"The legislature may delegate a part of the police power of the state to a municipality, but it cannot delegate the legislative functions of making laws that will be binding upon citizens between themselves in civil proceedings."

The contention of counsel for defendant in error that the ordinance was used "merely as evidence of negligence" is not sustained by the record. An examination of the instructions of the court (record 76) will disclose the fact, that the court in its charge to the jury referred to the ordinance which limited the rate of speed to six miles an hour, and stated that:

"Such act of the persons in charge of said train is evidence of negligence on the part of said defendant," but did not stop there, but further instructed the jury as follows:

"And if you further find that but for such speed so running in excess of six miles an hour, said train could have been stopped by the engineer in charge thereof, after he saw the child upon the track, or by the exercise of ordinary care and prudence could have seen her upon such track and before the engine would have reached her, then said defendant will be liable for the injuries so received."

The court, by this instruction, not only makes the violation of the ordinance *evidence* of negligence, but instructs the jury that if the engineer was running at a greater rate of speed than six miles an hour, that that fact in law constitutes negligence, for which the defendant

would be liable if an injury resulted in consequence thereof. The jury was not permitted to determine the question of negligence regardless of the ordinance, but the arbitrary rule was announced that the violation of the ordinance constituted actionable negligence, for which the defendant company was liable. The legislature of the State of Kansas has nowhere provided that any rate of speed of a railroad train is negligence *per se*, but the city council of Kansas City, Kansas, has enacted an ordinance, in the exercise of its power of police regulation, limiting the rate of speed of a train within the corporate limits to six miles an hour, which the court below held, in and of itself, constituted actionable negligence. If the action was not based upon the ordinance, and the recovery had because of its alleged violation, it is difficult to understand what is meant by the record in this case.

Another thing to which the attention of the court is respectfully called, is the fact that this accident occurred on the private property of the defendant company, and the ordinance is made to apply just the same as on a public street or a public street crossing.

ALBERT H. HORTON,
B. P. WAGGENER,
*Attorneys for Plaintiff in Error.*

Office Supreme Court
FILED
APR 16 1900
CLERK
Clerk

No. 249.

By: Watson for Def.

Filed April 16, 1900.

# SUPREME COURT

## OF THE

## UNITED STATES.

Newman Erb, as Receiver of The Kansas City Wyandotte and Northwestern Railroad Company,

*Plaintiff in Error,*

vs.

Otto J. Morasch and Elisa Morasch, as Next of Kin of Irene Morasch, Deceased,

*Defendants in Error.*

249

*In Error to the Supreme Court of the State of Kansas.*

## BRIEF OF DEFENDANTS IN ERROR.

GEORGE B. WATSON,
Attorney for Defendants in Error.

IN THE

# SUPREME COURT

OF THE

UNITED STATES.

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Newman Erb, as Receiver of The Kansas City Wyandotte and Northwestern Railroad Company,

*Plaintiff in Error,*

*vs*

Otto J. Morasch and Eliza Morasch, as Next of Kin of Irene Morasch, Deceased,

*Defendants in Error.*

---

*In Error to the Supreme Court of the State of Kansas.*

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## BRIEF OF DEFENDANTS IN ERROR.

Owing to the inability of defendants in error to pay the cost of printing a brief of much length, the argument

in their behalf will necessarily be limited and directed to only such points as may warrant the affirmance of the judgment of the court below.

* * * * *

The statement of facts and quotations of testimony by plaintiff in error are in the main correct, but there are several important omissions and misconstructions thereof to which attention will be called in the course of argument.

## THE ALLEGED ERRORS.

**Counsel for Plaintiff in Error in their brief urge but two grounds for error, viz:**

### I

**The unconstitutionality of Ordinance No. 522 of Kansas City, Kansas, regulating the speed of railway trains within the city limits.**

### II

**The non-liability of Plaintiff in Error, he being a federal receiver, to Defendants in Error for injuries occasioned because of a violation of said ordinance.**

As these are both questions of law, the object of quoting in counsel's brief (pp. 5 to 10, 22 and 23) portions of the testimony of some of the witnesses and of the findings of the jury at the original trial of the cause (and wholly irrelevant to the issues herein) is not apparent. They will, however, be replied to in that order.

## I.

## CONSTITUTIONALITY OF THE ORDINANCE.

In the first place, after charging generally wantonness and recklessness, as quoted by counsel (brief p. 4) from the petition of the original plaintiffs, it was alleged the injury occurred because:

"Said train of cars was being driven and run at a high and dangerous rate of speed at the time of the accident through and within the corporate limits of the City of Kansas City, contrary to the ordinance of said city in such case made and provided."

Said petition was never attacked by any motion to make it more specific, definite or certain.

The answer filed in said cause (paragraph third, record p. 13) simply denies "that there is any ordinance of the City of Kansas City, Kansas, regarding the speed of locomotives."

It is insisted, however, (pp, 10, 11, 12, 13 and record pp. 59, 90, 94, 95, 98, 101), that because in the briefs of plaintiffs in error, the constitutionality of said ordinance as being violative of the fourteenth amendment to the constitution was raised in the Kansas Court of Appeals and in the Supreme Court of said state, such question is here for review.

It is a well understood rule of pleading that when the unconstitutionality of an act (or ordinance) is relied on as a matter of defense, its defects must be specifically pointed out. The answer of Erb, receiver, merely denied that

there was "any ordinance," and it must follow that his attempt to raise the question of the unconstitutionality of Ordinance No. 522 of Kansas City, Kansas, in the Kansas Court of Appeals and in the Supreme Court of said state, as being in contravention of the fourteenth amendment to the federal constitution, came entirely too late and cannot now be here considered. There was no pleading upon which to base any such contention.

But waiving, for the sake of argument only, the insufficiency of pleading of a federal question, it will appear that said Ordinance No. 522 was entirely constitutional.

By the uncontradicted testimony of W. S. Carroll and W. H. H. Freeman it was proven that the Inter-State Rapid Transit Railway Company, exempted from the provisions of said Ordinance No. 522 and upon the exception of which the plaintiff in error assails the said ordinance, was and always had been merely a street railway, originally operated by steam, though more recently and at the time of the accident by electricity.

*Witness Carroll testified (record pp. 52-53):*

Q. How long have you known of the operation of what has always been publicly known as the Elevated railroad, formerly the Interstate Rapid Transit Railway Company?

A. Since its operation in the city. I would have to study to find out when it was started first. I have known it since it was originally operated in the city. * * * *

Q. Tell the jury what kind of a traffic it does.

A. It has an ordinary street railway track.

Q. Have you ever seen it carrying any freight of any kind or character?

A. No; it is not a railroad of that character.

Q. What is its general business?

A. Its general business is that of a traffic railroad—street railway—for the conduct or carriage of passengers only from point to point within the corporate limits, and sometimes without, as it lies without.

Q. Where it runs without the corporate limits of the city, where does it go?

A. This road runs to Kansas City, Missouri. * * *

Q. Do you know what motive power was used in the operation of this Interstate Rapid Transit Railway last June?

* * * * *

A. It was electric motive power."

*Witness Freeman testified* (*record pp. 55-56*):

Q. "Do you know what is publicly called the Elevated road, formerly used to be the Interstate Rapid Transit Railway Company?

A. Yes, sir.

Q. You have seen it in operation?

A. Yes, sir.

Q. Almost daily since your residence in the city?

A. Yes, sir; I can say daily.

Q. What kind of traffic has it been engaged in ever since you have known it?

A. Carrying passengers.

Q. Did you ever see it carrying any freight?

A. I think not.

Q. Carrying passengers where?

A. Different parts of the city.

Q. Do you know what the uniform fare upon that railroad has been?

A. I think so.

Q. You may state to the jury.

Objected to.

A. A nickel."

Wm. Richardson, engineer in charge of the train at the time of the accident, testified, (record pp. 34, 35):

Q. "How fast was your train going immediately before the accident?

A. Well, before the accident, I was going probably * * * between 12 and 15 miles an hour.

Q. Between 12 and 15 miles an hour?

A. When I first seen it, yes sir; but I slacked up some before it happened.

Q. Now, as you neared the place of the accident, did you see an object on track or near the railroad?

A. No, sir; I seen that baby—I didn't see it—it wasn't on the track; it came on the outside of the track. I seen it first when it came up out of the weeds and got up on the track. I thought it was a chicken and I hadn't slacked up any; then at that time I seen it raise up and stand on its feet; I seen it was a child; then I was about three rails' lengths—about ninety feet—from the baby then.

Q. About ninety feet from the baby when you saw it was a baby?

A. Yes.

Q. How far were you away from what you took for a chicken when you first saw it?

A. Well, I was about two or three more rail lengths when I first saw it.

Q. Well, probably 150 or 200 feet?

A. No; probably 120 feet.

Q. One hundred and twenty feet?

A. One hundred and twenty feet to one hundred and forty feet.

* * * * *

Q. About how many rail lengths east of the child were you when you first saw what you took for a chicken?

A. About five or six.

Q. Do you know the length of those rails?

A. Yes, sir; 30 feet.

* * * * *

Q. Were the brakes in good condition that morning?

A. Yes, sir.

Q. The air worked perfectly?

A. Yes, sir.

Q. Now, say, going 12 miles an hour with the engine and brake in the condition your train was that morning, there being two coaches upon it, in what distance can you stop your train on an up grade as that was?

A. Going 12 miles an hour?

Q. Yes, sir.

A. Well, about an engine and two or three coaches lengths—about 200 feet.

* * * *

Q. How many coaches or cars in the train that day?

A. Two.

* * * *

Q. Now, with the train going six miles an hour, composed of an engine and two coaches, on a grade like that was and with your air and brakes in perfect condition, in what distance can you stop the train?

A. Well, stop the train in about 40 or 50 feet—six miles an hour."

From the above testimony of the engineer it appears that if he had been running his engine at the rate of six miles an hour, he could have stopped the train long before the collision, even after he discovered it was a child on the track; and in all probability he could have avoided the accident if he had attempted to bring his train under control after he noticed the object on the track—the nature of which was doubtful—as he was bound to do.

Mo. Pac. Ry Co. vs. Prewitt, (Kan. Ct. of App. So. Dept.), 51, Pac. 923.

By the testimony of witnesses Carroll and Freeman herein before quoted, the Interstate Rapid Transit Railway Company, which was excepted from the operation of the provisions of Ordinance No. 522, was shown to be an ordinary street railway, for the carriage of passengers only, between points in the cities of Kansas City in Missouri and Kansas for the uniform fare of five cents, and at the time of the accident, its motive power was electricity.

That ordinances of cities, as well as acts of the legislature, may discriminate and distinguish between the rates of speed to be observed within the corporate limits of a city by ordinary railroads with their ponderous trains and street cars, needs neither argument nor the citation of authority.

The running of a railroad train at a greater rate of speed than that designated by a city ordinance is negligence on the part of the company. Th ordinance was not void, and was competent evidence to be admitted in the case.

Meek vs. Penna Co., 38 Ohio St. 632.

Correll vs. Railroad Co., 38 Ia. 120.

That a classification of railroads, cities, corporations etc., may properly be made and are not invalid or violative of any constitutional provisions vid:

Railroad Company vs. Richmond, 96 U. S. 521, and the recently decided case of :

Clark vs. Kansas City, Kansas, 20 Sup. ct. Rep. 234.

II

**Are federal receivers liable for damages occasioned by violations of police regulations?**

The act of Congress permits receivers to be sued in State courts without leave from the court whose officers they are.

Receivers are liable for the negligent acts of employees

the same as the original company was.

Rouse vs. Hornsby, 67 Fed. (C. C. A.) 219.

It will not be contended by opposing counsel but that the city had power under legislative authority to enact police regulations to govern the speed of the trains within its corporate limits.

Some surprise may justly be manifested at the position taken in the brief.

It will be observed that in all the cases (Missouri cases only) cited in support of their second proposition, city ordinances were declared upon as the basis of the liability sought to be enforced, and the question was not —as here—as to their admissibility in evidence tending to show negligence. Negligence is the gist of this action. If murder, burglary, arson, assault, or other crime occasion civil damage, the criminal law may punish; but that is not the basis for recovery in a civil suit. Neither is it the ordinance in question upon which this action was based. It was merely evidence of negligence. Every person has a right to presume that every other person —even railroads—will be law-abiding, and observe such police regulations as commend themselves to the public mind as necessary for the protection of life and property. And there is a respectable line of authority that a violation of such regulations as limit the speed of trains in city limits constitutes negligence per se.

In the Meek and Coverell cases, before referred to,

the better rule is adopted of admitting such ordinances as evidence of negligence. This rule the Supreme Court of Kansas here followed:

It is therefore respectfully submitted that ordinance 522 of Kansas City, Kansas, is valid and constitutional; that no federal question is raised in the record; that no error was committed in this cause by the Supreme Court of Kansas and that its judgment should be affirmed.

GEORGE B. WATSON,

Attorney for Defendants in Error.

# ERB *v.* MORASCH.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 249. Submitted April 18, 1900. — Decided May 14, 1900.

All questions arising under the constitution and laws of Kansas are, for the purposes of this case, foreclosed by the decisions of the state courts.

It is the duty of a receiver appointed by a Federal court to take charge of a railroad, to operate it according to the laws of the State in which it is situated, and he is liable to suit in a court other than that by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing.

A city, when authorized by the legislature, may regulate the speed of trains within its limits, and this extends to interstate trains in the absence of congressional action on the subject.

The Interstate Transit Railway is a railway connecting Kansas City, Missouri, with Kansas City, Kansas, and the exception of its trains from the general provision in the city ordinance respecting the speed of trains in the city was an exception entirely within the power of the legislature to make.

THE case is stated in the opinion.

*Mr. B. P. Waggener* and *Mr. Albert H. Horton*, for plaintiff in error.

*Mr. George B. Watson* for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

While in their briefs many matters are discussed with full-

ness and elaboration by counsel for plaintiff in error we are of opinion that those of a Federal nature involved in this record are few in number and practically determined by previous decisions of this court. Of course, all questions arising under the constitution and laws of Kansas are, for the purposes of this case, foreclosed by the decisions of the state courts. *Turner* v. *Wilkes County Commissioners*, 173 U. S. 461; *Brown* v. *New Jersey*, 175 U. S. 172, and cases cited in opinion.

In September, 1888, the city council of Kansas City passed an ordinance regulating the running of railroad trains through that city. Sections 2 and 8 are the only ones material to the present controversy. They are as follows:

"SEC. 2. It shall be unlawful for any such engineer, conductor or other persons having a railway engine or train of cars in charge to permit the same to be run along any track in said city at a greater speed than six miles an hour."

"SEC. 8. The provisions of this ordinance shall not apply to the Interstate Rapid Transit Railway Company, excepting with reference to funeral or other processions."

Now, in respect to the Federal questions, we remark, first, that it is the duty of a receiver, appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the State in which it is situated. Act of August 13, 1888, c. 866, § 2; 25 Stat. 433, 436; *United States* v. *Harris*, *ante*, 305.

Second, that he is liable to suit in a court other than that by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing. *McNulta* v. *Lockridge*, 141 U. S. 327; *Texas & Pacific Ry.* v. *Cox*, 145 U. S. 593.

Third, that a city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits. *Railroad Company* v. *Richmond*, 96 U. S. 521; *Cleveland &c. Railway Co.* v *Illinois*, *ante*, 514. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the State until at least Congress shall take action in the matter.

And, fourth, the sections quoted of the ordinance are not in

conflict with those provisions of the first section of the Fourteenth Amendment to the Constitution, which restrain a State from denying the equal protection of the laws. This last proposition seems to be the only matter requiring anything more than a declaration of the law and a citation of decided cases.

The contention here is that the exception of the Interstate Transit Railway Company from the provision in reference to the speed of its trains creates a classification which is arbitrary and without any reasonable basis, and, therefore, operates to deny the equal protection of the laws. *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150. If there were nothing in the record beyond the mere words of the ordinance we are of opinion that that contention could not be sustained, because it is obvious on a moment's reflection that the tracks of different railroads may traverse the limits of a city under circumstances so essentially different as to justify separate regulations. One may pass through crowded parts crossing or along streets constantly travelled upon by foot passengers and vehicles, while others may pass through remote parts of the city where there is little travel and little danger to individuals or carriages. One may pass through such parts of the city as will prevent its tracks from being fenced and where it is not in fact fenced, while another may pass through parts which permit of the fencing of the tracks and where its tracks are in fact fenced. Under those circumstances a difference of regulation as to the matter of speed would be perfectly legitimate, and it could not be held that the classification was arbitrary or without reasonable reference to the conditions of the several roads. With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains.

But in this case we are not left to any mere matter of presumption. The testimony discloses that the Interstate Rapid Transit Railroad is simply a street railroad connecting the cities of Kansas City, Missouri, and Kansas City, Kansas, operated at the time of the passage of the ordinance by steam power, but

with that power used only in dummy engines, and, at the time of the accident involved in this case, by electricity. It is true that there is testimony that at or near the place where the accident happened parties thought the operation of the street railroad was more dangerous than the operation of the railroad of which the plaintiff in error was receiver, but the validity of such an ordinance is not determinable by individual judgments. It is not a question to be settled by the opinions of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necessary to uphold the ordinance is that there is a difference, and that existing it is for the city council to determine whether separate regulations shall be applied to the two. It is not strange that one witness differs from another in respect to the comparative danger of the two roads. One jury might also disagree with another in respect to the same matter. But neither witness nor jury determine the validity of state or municipal legislation. Given the fact of a difference it is a part of the legislative power to determine what difference there shall be in the prescribed regulations. We see nothing else in this case calling for notice, and the judgment of the Supreme Court of Kansas is

*Affirmed.*